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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-943

PETER PREISER, Commissioner of Correctional Services of New York State; JANICE WARNE, Warden of Bedford Hills Correctional Facility, Bedford Hills, New York; ROBERT HENDERSON, Superintendent of the Auburn Correctional Facility, Auburn, New York, and all other persons similarly situated; PAUL J. REGAN, Chairman of the New York Parole Board; and HUGH CAREY, Governor of the State of New York,

Petitioners,

against

UNITED STATES OF AMERICA ex rel. LOIS SERO, VANESSA CARNEY, RITA VARNER, EDNA GRIFFIN, DAISY JOHNSON, LINDA FELONG, DIANE PIACENTINE, SUSAN PASNICK, JUDY SPRATLING, and all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

PETER PREISER, Commissioner of Correctional Services of New York State; JANICE WARNE, Warden of Bedford Hills Correctional Facility, Bedford Hills, New York; ROBERT HENDERSON, Superintendent of the Auburn Correctional Facility, Auburn, New York, and all other persons similarly situated; PAUL J. REGAN, Chairman of the New York Parole Board; and HUGH CAREY, Governor of the State of New York,

Petitioners,

against

UNITED STATES OF AMERICA ex rel. LOIS SEBO, VANESSA CARNEY, RITA VARNER, EDNA GRIFFIN, DAISY JOHNSON, LINDA FELONG, DIANE PIACENTINE, SUSAN PASNICK, JUDY SPRATLING, and all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Peter Preiser, the Commissioner of Correctional Services of the State of New York; Janice Warne, Warden of Bedford Hills Correctional Facility, Bedford Hills, New York; Robert Henderson, Superintendent of the Auburn Correctional Facility, Auburn, New York, and all other persons similarly situated; Paul J. Regan, Chairman of the New York Parole Board; and Hugh Carey, Governor of the State of New York, pray that a writ of certiorari

ssue to review a decision of the United States Court of Appeals for the Second Circuit in the case of *United States ex rel. Lois Sero, et al.* v. *Peter Preiser, et al.*, which was decided on November 6, 1974.

Opinions Below

The decision of the Court of Appeals which petitioners seek to review is not yet reported. It is reproduced as Appendix A. The final order and memorandum of the District Court, dated June 26, 1975, which was affirmed in part and remanded in part by the Court of Appeals, is reproduced as Appendix B. The final order of the District Court, dated July 11, 1974, is reproduced as Appendix C. The memorandum of the District Court, dated March 6, 1974, is reported at 372 F. Supp. 663, and is reproduced as Appendix D. The memorandum of the District Court, dated January 23, 1974, is reported at 372 F. Supp. 660, and is reproduced as Appendix E. The memorandum of the District Court, dated February 27, 1973, is reported at 355 F. Supp. 1231 and is reproduced as Appendix F. The memorandum of the District Court, dated October 25, 1972, is reported at 351 F. Supp. 522 and is reproduced as Appendix G.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The decision of the Court of Appeals was handed down on November 6, 1974.

Questions Presented

Whether the class action device may be utilized in a habeas corpus proceeding?

Whether, in light of 28 U.S.C. § 2241(d), a Federal District Court, in a State containing two or more Federal Districts, has jurisdiction over federal habeas corpus ap-

plicants who were neither confined nor sentenced in the district where the Court is sitting?

Whether respondents exhausted available State remedies?

Whether a claim for declaratory relief pursuant to 42 U.S.C. § 1983, with the object of terminating the custody of State prisoners, may be brought in a habeas corpus proceeding?

Whether the courts below erred in summarily granting relief on the merits?

Statutes Involved

The statutes involved are former New York Penal Law, Sections 75.00 and 75.10; 28 U.S.C. § 2241(a); and 28 U.S.C. § 2241(d). These are reproduced in full in Appendix H.

Statement of the Case

Respondents commenced this action pursuant to 42 U.S.C. § 1983 in February, 1972, in the United States District Court for the Southern District of New York. Jurisdiction was purportedly based on 28 U.S.C. § 1343(3)(4), § 2201 and § 2281. Lois Sero and her co-plaintiffs attacked the constitutionality of Sections 75.00 and 75.10 of the New York Penal Law* providing for indefinite four year reformatory sentence for young adults between the ages of sixteen and twenty-one.** Plaintiffs claimed that the four

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* The reformatory statute was subsequently repealed, but the repeal was not made retroactive. Chapter 653(7) of New York Laws of 1974.

** An additional constitutional attack on §§ 803 and 804 of the New York Correction Law, denying persons serving reformatory sentences the right to earn good time for good behavior, was mooted by a subsequent statutory change. Chapter 653 of New York Laws of 1974.

year sentence deprived them of due process of law and equal protection of the laws in that they were receiving no specialized treatment and were sentenced without a hearing and without any standards.

In April, 1972, the respondents moved for a preliminary injunction and a three-judge court under 28 U.S.C. § 2281. The State defendants moved to dismiss. By its opinions and orders of October 25, 1972, and February 27, 1973, the District Court found that a three-judge court was warranted, and a three-judge court was convened. The convening court also ruled that a class consisting of all reformatory-sentenced misdemeanants serving four-year terms in the entire New York prison system was appropriate.

While the case was *sub judice* before the three-judge court, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), was decided by this Court. In light of *Rodriguez*, plaintiffs withdrew their claim for declaratory and injunctive relief, and the three-judge panel was dissolved. The case was remitted to the convening court for disposition as a habeas corpus proceeding.

In November, 1973, the plaintiffs, now petitioners in habeas corpus, moved to restore their prayer for declaratory relief pursuant to 42 U.S.C. § 1983. The District Judge granted the motion on the grounds that conditions of confinement were involved. At the same time the District Judge concluded that a class action was proper in the habeas corpus proceeding and reaffirmed the statewide scope of the class. 372 F. Supp. 660.

With their claims sounding in both § 1983 and habeas corpus, respondents moved for summary judgment. The District Judge granted summary judgment declaring Article 75 to be unconstitutional as applied. The decision turned on the District Judge's belief that respondents had proved that reformatory sentenced inmates were being con-

fined under the same terms and conditions as non-reformatory adult misdemeanants at ordinary prisons.

The State appealed the District Court's decision and judgment to the Court of Appeals for the Second Circuit. On November 6, 1974, that Court rendered a decision affirming in part and remanding in part the decision of the District Court. The Court of Appeals agreed with the District Court that the conditions of confinement were the same for reformatory sentenced inmates as non-reformatory adult misdemeanants and that this deprived petitioners of equal protection of the laws. The Court of Appeals also agreed with the District Court that the class action device could be utilized in a habeas corpus proceeding and that the statewide scope of the class was proper. The Court of Appeals did not consider it necessary to decide whether the prayer for § 1983 declaratory relief was properly brought in a habeas corpus proceeding in view of its disposition of the habeas corpus claims. The case was remanded to the District Court for a determination as to whether a longer period of parole, based on differences in parole services offered to reformatory and non-reformatory inmates, might be justified.

Reasons Why Certiorari Should Be Granted

In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), this Court held that habeas corpus is the *exclusive* remedy available in a suit challenging the fact or duration of confinement. *Preiser* v. *Rodriguez*, at 489, 500. In *Rodriguez*, habeas corpus was viewed as a "specific" remedy, created by Congress with special rules and procedural limitations, including but not limited to the requirement of exhaustion of available state remedies. 411 U.S. at 489, 492, fn. 10. Earlier, in *Harris* v. *Nelson*, 394 U.S. 286 (1969), this Court recognized that habeas corpus is an historically unique remedy of a personal nature with special procedural limitations.

The respondents below challenged the facts and duration of their confinement by attacking the constitutionality of the New York reformatory statute *as applied*. The courts below allowed a class action of statewide scope to be used in a habeas corpus proceeding and terminated petitioners' confinement by issuing en masse writs of habeas corpus, but only after issuing a declaratory judgment pursuant to 42 U.S.C. § 1983 that the statute was unconstitutional as applied to every member of the class regardless of the institution in which he was confined. In so doing, the courts below completely circumvented this Court's decision in *Preiser* v. *Rodriguez* and emasculated the traditional concept of habeas corpus as a specific and personal statutory remedy with its own particular rules. As a practical matter, the proceedings below were treated, not as habeas corpus, but as an ordinary civil rights action.

This case thus presents questions of critical importance to the future of habeas corpus. At stake is nothing less than the continuing vitality of this Court's decision in *Preiser* v. *Rodriguez* and the concept of habeas corpus as the personal and specific statutory remedy as provided for and intended by Congress.

1. Class actions are inappropriate in habeas corpus proceedings, and should not be utilized to undermine the requirements of *Preiser* v. *Rodriguez*.

This Court should resolve the issue of whether the class action device may be utilized in a habeas corpus proceeding, and if so, under what circumstances. Looking to the history of habeas corpus, this Court has previouly held in the discovery context that the Federal Rules of Civil Procedure are inapplicable to habeas corpus by virtue of F.R.P.C. 81(a) (2). *Harris* v. *Nelson, supra,* 292-298. This Court in *Harris* v. *Nelson* expressly refrained from commenting on the applicability of Rule 23 governing class actions to habeas corpus proceedings. *Harris* v.

Nelson, supra, at 294, fn. 5. Since habeas corpus is historically a personal remedy, the class action device provided for by Rule 23 is totally inappropriate in a habeas corpus proceeding. See Moore's Federal Practice 1.03[1] (2d ed. 1967) ("The Federal Rules were primarily designed for plenary litigation, and cannot, therefore, be wholly applicable to proceedings which are summary in nature."). It has been noted that no case has been found in which anything resembling a class action was used in habeas corpus at common law or in equity. Note, *Multiparty Federal Habeas Corpus,* 81 Harv. L. Rev. 1482, 1493. The Court of Appeals, while professing not to import Rule 23 into habeas corpus proceedings, in effect did exactly that by permitting a class of statewide scope to go forward in a single habeas corpus proceeding. The result is a clear circumvention of *Preiser* v. *Rodriguez* and a significant departure from the traditional concept of habeas corpus.

Even if the class action device is not *per se* inappropriate in a habeas corpus proceeding, this Court should resolve the class action issue because the federal courts have thus far, in the absence of any guiding principles, adopted disparate approaches to the problem. In *Hill* v. *Nelson,* 272 F. Supp. 790 (N.D. Cal. 1967), a class action was denied because of unspecified "inherent procedural problems" where the class, defined as consisting of all condemned men in California, could have included prisoners from all the federal districts in California. In *Henry* v. *Warner,* 357 F. Supp. 495 (C.D. Cal. 1973) and *Daigle* v. *Warner,* 348 F. Supp. 1074 (D. Haw. 1972), a class action was permitted in habeas corpus proceedings brought by military defendants raising a common question of law. The class in *Daigle* consisted only of eligible defendants within a single federal district, but the territorial scope of the class was expanded in *Henry* to include military defendants wherever situated on the theory that the court's ruling would have an "effect" outside the Central District of California. In *Cantrell* v. *Folsom,* 332 F. Supp. 767

(M.D. Fla. 1971), a class action was permitted in a habeas proceeding attacking a local ordinance on its face. In *Adderly* v. *Wainwright*, 46 F.R.D. 97 (M.D. Fla. 1968); *Williams* v. *Richardson*, 481 F. 2d 358 (8th Cir. 1973); and *Mead* v. *Parker*, 464 F. 2d 1108 (9th Cir. 1972), class actions were permitted on issues of law and fact common to the class. In *Williams* and *Mead*, all members of the class were incarcerated in the same facility. *Williams* is the only post-*Rodriguez* case permitting a class action in a habeas corpus proceeding and concerned conditions of confinement.

These few cases allowing class actions in habeas corpus proceedings appear thus far to have been limited to situations involving inmates in a single facility or making a single legal argument that once resolved would be resolved finally and for all members of the class. The instant case, however, represents a major expansion of this hitherto limited use of the class action device in a habeas corpus proceeding. Until now no federal court has ever gone so far as to allow in a single habeas corpus proceeding a class of statewide scope consisting of individuals incarcerated in a wide variety of institutions each attacking a statute as applied to him. The result of this unprecedented use of the class action in habeas corpus is to virtually eliminate habeas corpus as a specific statutory and personal remedy, and must be regarded as contrary to the congressional mandate.

2. The court below erroneously interpreted 28 U.S.C. § 2241(d) as a venue provision and not a jurisdictional statute.

Assuming *arguendo* that the class action device was properly used in the circumstances of this case, the important question remains whether it was proper, as was done here, to include in the class inmates neither convicted and sentenced nor incarcerated within the Southern District of New York. 28 U.S.C. § 2241(d). This question

is of jurisdictional importance to modern habeas corpus litigation and should be decided by this Court.

In including in the class inmates neither convicted and sentenced nor incarcerated in the Southern District of New York, the District Court brought before it persons over whom it had no jurisdiction whatsoever. The Court of Appeals approved this result by interpreting § 2241(d) as a venue and not a jurisdictional provision. The court relied extensively on this Court's decision in *Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973). However, *Braden* construed § 2241(a) and did not address itself to § 2241(d), which is specifically applicable here. This Court decided in *Braden* only that in the peculiar circumstance there of the interstate detainer § 2241(a) could not be held to dictate an inconvenient out-of-state forum. In the instant case, where § 2241(d) specifically applies, there is no question of inconvenience of an out-of-state forum or any other forum for any of the reasons given in *Braden.*

As the court below noted, the legislative history of § 2241(d) shows that § 2241(d) was designed to insure a convenient forum for state prisoners seeking habeas corpus relief by providing for two alternative forums in which to bring the writ. However, nothing in the legislative history of the statute (Senate Report No. 1502, 89th Cong. 2d Sess. 1966) suggests that the considerations of convenience which were the *raison d'etre* of § 2241(d) would permit a habeas applicant to bring a writ in a forum not specified in the statute. Indeed the language of the statute, which speaks of "concurrent jurisdiction" of the two specified alternative forums, is unambiguously jurisdictional. The legislative history itself indicates § 2241(d) was simply an amendment to the jurisdictional bases of habeas corpus, which the courts below had no power to expand in the guise of judicial interpretation.

Thus far the federal courts have divided on the issue. Until the Court of Appeals' decision below, the weight of

authority interpreted § 2241(d) as jurisdictional in nature. *United States ex rel. Jimenez* v. *Conboy*, 310 F. Supp. 801 (S.D.N.Y. 1970); *United States ex rel. Griffin* v. *LaVallee*, 270 F. Supp. 531 (E.D.N.Y. 1967); *United States ex rel. Ervin* v. *Sawner*, 322 F. Supp. 1108 (S.D.N.Y. 1971); *Bransted* v. *Schmidt*, 324 F. Supp. 1232 (W.D. Wis. 1971); *United States ex rel. Urbano* v. *Yeager*, 323 F. Supp. 774 (D. N.J. 1971); *United States ex rel. Ayala* v. *Tubman*, 366 F. Supp. 1268 (E.D.N.Y. 1973); contra, *United States ex rel. Ruffin* v. *Mancusi*, 300 F. Supp. 687 (E.D.N.Y. 1968). It is thus appropriate that this important question now be resolved by this Court.

3. The courts below erred in not requiring all habeas applicants to have exhausted state remedies as a predicate to seeking release from state custody.

This Court should determine whether petitioners have exhausted available state remedies, as required by 28 U.S.C. § 2254(b)(c). The courts below found that some members of the petitioning class had exhausted available state remedies, and that it would therefore be futile to require exhaustion by all other petitioners. While such a position may be tenable where a statute is attacked on its face, it obviously is not where, as here, the challenge is to the statute *as applied*. Since the statute may be applied to different persons in different ways, exhaustion by one petitioner cannot possibly constitute exhaustion for others. In deciding to the contrary the courts below again evaded the clear dictates of the *Preiser* v. *Rodriguez* holding and ignored the personal and individual character of the habeas corpus remedy.

4. The courts below erred in permitting a § 1983 civil rights action to be used as a substitute for habeas corpus.

This Court should decide whether a claim for § 1983 declaratory relief, where the result sought is release from

confinement, is cognizable in a habeas corpus proceeding in view of this Court's decision in *Preiser* v. *Rodriguez*. The District Court granted such relief but the Court of Appeals, in the view it took of the case, did not consider it necessary to decide whether this was proper. However, there can be no doubt that the writs of habeas corpus in this case were issued as a mere ministerial by-product of the District Court's declaratory judgment pursuant to § 1983 that the New York reformatory statute was unconstitutional as applied. As a practical matter, the proceedings below were treated as a § 1983 action, though styled as a habeas corpus proceeding. This was a clear circumvention of this Court's decision in *Preiser* v. *Rodriguez** that habeas corpus was the exclusive remedy available in suits challenging the validity of confinement and that § 1983 actions may not be used as substitutes for habeas corpus. See also *O'Shea* v. *Littleton*, 414 U.S. 488, 496, 94 S. Ct. 669, 676 (1974).

This is not a case where petitioners challenged the conditions of their confinement apart from any challenge to the fact or duration of their confinement, in which case their § 1983 claim might properly be brought simultaneously with the habeas claim. *Preiser* v. *Rodriguez*, at 499, fn. 14. The object of the § 1983 claim was without a doubt a termination of confinement. That this was impermissible under *Preiser* v. *Rodriguez* was made clear in this Court's recent decision in *Wolff* v. *McDonnell*, —— U.S. ——, 94 S. Ct. 2963 (1974). There the plaintiffs challenged the constitutional validity of disciplinary procedures resulting in loss of good time in an action pursuant to § 1983. This Court held that *Preiser* v. *Rodriguez* foreclosed § 1983 relief with respect to *actual* restoration of good time credits, although it was said that a declaratory judgment as a predicate for

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* It appears clear that the Justices in the Second Circuit responsible for *Rodriguez* at the Circuit Court level gave only grudging attention to this Court's decision.

a damage award would not be barred by *Preiser* v. *Rodriguez*. The petitioners in the instant case never asked for damages and accordingly had no basis for declaratory relief pursuant to § 1983. Since petitioners challenged only the fact and duration of their confinement, their *only* remedy was habeas corpus.

Preiser v. *Rodriguez* was not merely concerned with the requirement that persons challenging the fact or duration of their confinement exhaust available state remedies. This Court was concerned with all the special rules and procedural limitations of the habeas corpus remedy. That habeas corpus is governed by special rules and limitations other than the exhaustion requirement is clear. *Harris* v. *Nelson, supra.* By tacking on a claim for § 1983 relief, the petitioners attempted to avoid the well settled principle that declaratory relief will not be granted "where a special statutory proceeding has been provided." *Katzenbach* v. *McClung*, 379 U.S. 294, 296 (1964); *Public Service Commission* v. *Wycoff*, 344 U.S. 237, 243 (1952). The federal courts have uniformly held that habeas corpus is such a "special statutory proceeding" and have refused to grant declaratory relief where the result of the action was to avoid the entire panoply of statutory procedures created for the special statutory remedy of habeas corpus irrespective of any question of available state remedies. See *Ruip* v. *Commonwealth of Kentucky*, 400 F. 2d 871, 872 (6th Cir. 1968), *cert. den.* 395 U.S. 911 (1969); *Pruitt* v. *Campbell*, 429 F. 2d 642, 645 (4th Cir. 1970). Clearly, the § 1983 claim in the instant case contravened one of the procedural limitations of the habeas corpus statute and as such constituted a clear circumvention of *Preiser* v. *Rodriguez*.

5. The courts below erred in summarily granting relief on the merits.

The federal courts have uniformly upheld the concept of extended confinement for young people in exchange for a

rehabilitative quid pro quo. *Caldwell* v. *United States*, 435 F. 2d 1079 (10th Cir. 1970); *Abernathy* v. *United States*, 418 F. 2d 288 (5th Cir. 1969); *United States* v. *Rehfield*, 416 F. 2d 273 (9th Cir. 1969), cert. denied 397 U.S. 996 (1970); *United States* v. *Dancis*, 406 F. 2d 729 (2d Cir. 1969) cert. denied 394 U.S. 1019 (1969); *Carter* v. *United States*, 306 F. 2d 283 (D.C. Cir. 1962).

The courts below, in findings respondents were deprived of equal protection of the laws, ignored this fundamental constitutional principle and granted summary judgment in the complete absence of any material and undisputed facts. Rule 56, Federal Rules of Civil Procedure. The Court of Appeals found Article 75 unconstitutional because respondents sentenced to reformatory terms in New York State's institutions were "confined for four years in the same correctional institution under identical conditions and with exactly the same rehabilitation program as an adult whose term could not under the law exceed three months to one year." Appendix A, p. 16a. This conclusion was clear error. The reason is simple: unlike respondents, adults whose sentences cannot exceed one year are not even confined in New York State's correctional institutions, but rather in local and county facilities. New York Penal Law, 70.20(2). There was no evidence whatsoever before the courts below concerning rehabilitative efforts or conditions of confinement for adult misdemeanants. Since the Court of Appeals never compared respondents' rehabilitative treatment and conditions of confinement with that experienced by adult misdemeanants, a finding of an equal protection violation was impossible.

Moreover, the courts below applied the wrong constitutional standard in ruling that the statute was unconstitutional because in their view reformatory inmates were treated no differently than adult inmates in ordinary prisons. It has never been the law that adult inmates may not also receive the same rehabilitative treatment provided to

reformatory inmates. The quid pro quo of the extended reformatory sentence is rehabilitative treatment, and it is essentially irrelevant that a program of rehabilitation fitted to the needs of an individual inmate is either shared by other inmates or that a custodial regime suitable to the reformatory sentenced inmates may also be suitable for other inmates, or that reformatory sentenced inmates are not segregated from other inmates. There is no constitutional mandate that reformatory sentenced inmates be segregated or receive treatment different from non-reformatory sentenced inmates. The federal courts have held to the contrary with respect to individuals held in adult maximum security institutions. *Moore* v. *Haugh,* 341 F. Supp. 1263, 1265-66 and fn. 4 (N.D. Iowa, 1972); *Sonnenberg* v. *Markley,* 289 F. 2d 126, 129 (7th Cir. 1961); *Arkadiele* v. *Markley,* 186 F. Supp. 586 (S.D. Ind. 1960); *Suarez* v. *Wilkinson,* 133 F. Supp. 38 (M.D. Pa. 1955). These cases make clear that as long as a rehabilitation program is available to an inmate, the place or type of his incarceration does not raise any constitutional issues. This Court in *McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971), upheld the efforts of the juvenile courts for rehabilitation of juveniles while aware that juveniles were often committed to adult institutions.

Accordingly, the only appropriate constitutional inquiry to be made in the instant case is whether each of New York's reformatory sentenced inmates, located in different institutions with different programs throughout the State, in fact receive the rehabilitative quid pro quo necessary to justify the extended period of confinement. This inquiry was *never* made by the courts below.

CONCLUSION

Petitioner's application for certiorari should be granted.

Dated: New York New York, January 31, 1975.

Respectfully submitted,

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Appendix A

Decision of the United States Court of Appeals for the Second Circuit, dated November 6, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 299—September Term, 1974.

(Argued October 11, 1974 Decided November 6, 1974.)

Docket No. 74-1944

UNITED STATES ex rel. LOIS SERO, et al.,

Petitioners-Appellees,

v.

PETER PREISER, et al.,

Respondents-Appellants.

Before:

KAUFMAN, *Chief Judge,*
SMITH and TIMBERS, *Circuit Judges.*

Appeal by respondents Peter Preiser, *et al.* from summary judgment by the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge,* declaring unconstitutional the continued application of the reformatory sentence provisions of former New York Penal Law Article 75, and granting writs of habeas corpus ordering release or resentencing of all young adults serving terms imposed under those sections.

Affirmed in part and remanded in part.

Appendix A.

RALPH L. MCMURRY, New York, N.Y. (Louis J. Lefkowitz, Attorney General, on the brief; Samuel A. Hirshowitz, of counsel), *for Appellants.*

HERMAN SCHWARTZ, Amherst, N.Y. (Edward I. Koren, Amherst, N.Y., Elizabeth B. DuBois, Michael E. Smith, New York, N.Y., on the brief), *for Appellees.*

KAUFMAN, *Chief Judge:*

This class action presents important procedural questions regarding the present scope of what once was termed "the most celebrated writ in the English law." Blackstone, Commentaries, Bk. III, 129. It also calls upon us to decide the more pressing human problem of the proper treatment to be afforded young adults sentenced under a New York statute, subsequently repealed, to four year reformatory terms after conviction for misdemeanors for which adults receive maximum terms of one year or less. The district court, after five opinions and more than two years of litigation, granted writs of habeas corpus ordering release or resentencing of all those serving reformatory sentences under New York Penal Law Article 75. For the reasons elaborated below, we affirm in part, and remand in part.

I.

Until very recently, New York provided a special sentence of imprisonment for most young adults, aged 16 to 21, regardless of the nature of the crimes they had committed. These youths would be given terms of unspecified duration, to terminate either upon discharge on parole, or after service of four years of confinement. N.Y. Penal

Law §§ 75.00, 75.10 (McKinney 1967). Sentences were to be served in youth rehabilitation facilities [reformatories], which the Correction Law distinguished from state prisons. N.Y. Correction Law § 314 (McKinney 1968). *See also id.* § 315. The purpose of this reformatory sentence was "to provide education, moral guidance and vocational training for young offenders," and to achieve this end the Department of Correction and the State Board of Parole employed special resources. Reformatories had special schools and shops, and parole officers working with young adult offenders had specialized caseloads. Thus, although the maximum terms that could be imposed upon adults for class A and class B misdemeanors were one year and three months respectively, N.Y. Penal Law § 70.15 (McKinney 1967), the special four year reformatory sentence was thought to be justified as a means to effect the unique rehabilitative goals envisioned for young adults. Practice Commentary to N.Y. Penal Law § 75.10 (McKinney 1967).

In 1970, the Correction Law was amended to abolish the distinction between reformatories and prisons. All institutions became correctional facilities, "used for the purpose of providing places of confinement and programs of treatment for persons in the custody of the department." N.Y. Correction Law Article 4 [§ 70(2)] (McKinney Supp. 1974-75), *replacing, inter alia,* N.Y. Correction Law Articles 3-A, 3-B, 4, 5, 12A (McKinney 1968). Thereafter, inmates serving reformatory sentences as well as other prisoners could be assigned to any of New York's correctional facilities, where the two groups would work, sleep, eat, and spend recreation time together. The statcational or vocational training different from that offered adult prisoners; those serving reformatory sentences also became subject to the same regulations and disciplinary utory scheme no longer provided young adults with edu-

sanctions as older inmates. The commendable goal was to afford young adult offenders, and indeed all prisoners, treatment in accordance with the rehabilitative aims of the New York Correction Law, *see* N.Y. Correction Law § 70 (2); (McKinney Supp. 1974-75); 7 N.Y.C.R.R. § 250.2 (a) (1970).

After the 1970 reform of the Correction Law, Lois Sero, Vanessa Carney, and Rita Varner, inmates of the Bedford Hills Correctional Facility, began this action under the Civil Rights Act, 42 U.S.C. § 1983 (1970), requesting the convening of a three-judge court, permission to proceed as a class action, and a declaratory judgment that the four year reformatory sentencing scheme, N.Y. Penal Law §§ 75.00, 75.10, was unconstitutional.[1] They claimed that the challenged sections violated the equal protection clause of the Fourteenth Amendment by authorizing a term of confinement for reformatory-sentenced misdemeanants which was substantially longer than that provided for adults by N.Y. Penal Law § 70.15, since unique rehabilitative treatment was no longer provided to young adult inmates. The district court allowed the action to proceed on behalf of the class of reformatory-sentenced misdemeanants, *Sero* v. *Oswald,* 351 F.Supp. 522 (S.D. N.Y. 1972), and directed that the issue be submitted to a three-judge court, *Sero* v. *Oswald,* 355 F.Supp. 1231 (S.D.N.Y. 1973). After extensive discovery and argument

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[1] The inmates also attacked as unconstitutional the provisions of the N. Y. Correction Law, §§ 803, 804 (McKinney 1968) granting good behavior allowances only to those offenders serving indeterminate and definite sentences. This claim has been rendered moot by the enactment of N.Y.L. 1974, chs. 652, 653, retroactively granting such time off to members of the petitioning class.

In addition, the class claimed a violation of due process in New York's failure to provide a hearing on reformability before the imposition of a reformatory sentence. Because of the disposition it reached on the equal protection claim, the district court found it unnecessary to rule on this issue.

of the case before the three-judge court, however, the Supreme Court decided, in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), that a challenge to the fact or duration of confinement could not be brought under § 1983. Accordingly, the three-judge court was dissolved, and the case was remanded to Judge Lasker for disposition as a petition for habeas corpus. The district judge allowed the case to continue as a class action, *United States ex rel. Sero* v. *Preiser*, 372 F.Supp. 660 (S.D.N.Y. 1974).[2]

Shortly after the petitioning class had moved for summary judgment, the four-year reformatory sentence provisions of N.Y. Penal Law Article 75 were prospectively repealed, N.Y. Laws 1974, ch. 652, § 7. The bill calling for repeal was sponsored and drafted by the Department of Corrections. A memorandum submitted by Deputy Commissioner William C. Donnino to the State Assembly explained its purpose:

> This bill is a logical culmination of the restructuring of the State correctional system which was commenced by the legislature in 1970 when it created the Department of Correctional Services and abolished the distinction between reformatories and State prisons.
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> As provided by the 1970 legislation, Article 4 of the Correction Law mandates that every institution operated by the Department of Correctional Services for the confinement of inmates . . . shall be a correctional facility maintained for the purpose of providing places of confinement and treatment with the objective of assisting inmates to live as law abiding citizens. Correctional facilities are classified by functions, such as residential treatment facilities, general confinement facilities and work release facilities. Individuals, re-

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[2] Judge Lasker also permitted the class to proceed simultaneously with its declaratory judgment claim under § 1983.

> gardless of the type of sentence they are serving, are confined in institutions best suited to their needs. For purposes of confinement, treatment, education and vocational training, persons serving reformatory or indeterminate sentences are treated in accordance with rehabilitative goals rather than the type of sentence they are serving. Since reformatories as well as the special purposes they historically served no longer exist, there is no longer a need for reformatory sentences.
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> Moreover, the sentenec is unfair in that it treats young adults . . . more harshly than adults.

This memorandum was submitted on the motion for summary judgment, and upon this and other grounds, Judge Lasker granted writs of habeas corpus to the class. *United States ex rel. Sero* v. *Preiser,* 377 F.Supp. 463 (S.D.N.Y. 1974).[3] He found that, although longer sentences could, under some circumstances, be imposed on young offenders without violating the Constitution, New York's extended detention of the petitioning class ran afoul of the equal protection clause. He reasoned that since the treatment received by young adults, as well as all other conditions of custody, were the same as those afforded adult misdemeanants, any basis for longer periods of incarceration had disappeared. Thus, the court ordered the unconditional discharge of those who had already served adult-length terms, and provided for resentencing within thirty

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[3] We find unpersuasive respondents' argument, raised for the first time on appeal, that the district court improperly considered Donnino's statement in granting summary judgment and the writs requested. The answer to the petitioners' Statement of Substantial Undisputed Facts submitted on the motion for summary judgment admitted that, in making the statement to the Assembly, Donnino had acted as the agent of the Commissioner of Corrections.

days of those who had not.[4] Thereafter, this court denied a stay of the order of release but granted the respondents' motion for an expedited appeal. We required, however, that those discharged report their addresses monthly to the releasing institution or parole office. By September 3, 1974, more than 500 members of the class had either been freed from correctional facilities or parole, or were in the process of being resentenced.

II.

Although this case presents a number of difficult procedural problems, resolution of several of those questions will be assisted by a more exact understanding of the nature of the petitioners' substantive claim. Consequently we shall turn directly to the merits of the constitutional issue. The circumstances upon which the class relies in charging a denial of equal protection are relatively uncomplicated. Although the four-year reformatory sentence provisions of New York Penal Law Article 75 were prospectively repealed this year, each member of the class was sentenced under that Article to a term substantially in excess of the adult penalty for the same misdemeanor. And while prior to the 1970 reform of the Correction Law these extended sentences would have been served in reformatories, the petitioners claim that the treatment they now receive, as well as all other conditions of their custody, are identical to those afforded adult misdemeanants. It is

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[4] The district court also granted summary judgment on the § 1983 claim, declaring Article 75 unconstitutional to the extent that it authorized the imposition of extended sentences on members of the class. Because of our conclusion on the habeas corpus claims of the reformatory-sentenced inmates, we need not consider whether such a declaratory judgment would be permitted under *Wolff* v. *McDonnell*, 94 S. Ct. 2963 (1974), and *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

the combination of these two factors to which they point as a deprivation of their fourteenth amendment rights.

We state preliminarily that neither of the conditions relied upon, considered separately, would entitle the class to the relief it seeks. The claim that longer periods of confinement may not constitutionally be imposed on young offenders has been frequently raised under the parallel provision of the Federal Youth Corrections Act, 18 U.S.C. § 5010 (1970), and uniformly rejected. (*See, e.g., Caldwell* v. *United States,* 435 F.2d 1079 (10th Cir. 1970); *Abernathy* v. *United States,* 418 F.2d 288 (5th Cir. 1969); *United States* v. *Rehfield,* 416 F.2d 273 (9th Cir. 1969), *cert. denied,* 397 U.S. 996 (1970); *United States* v. *Dancis,* 406 F.2d 729 (2d Cir.), *cert. denied,* 394 U.S. 1019 (1969); *Carter* v. *United States,* 306 F.2d 283 (D.C. Cir. 1962). The justification for this was best stated by Chief Justice [then Judge] Burger:

> [T]he basic theory of that Act is rehabilitative and in a sense this rehabilitation may be regarded as comprising the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison.

Carter v. *United States, supra,* at 285. Nor is it necessary in this case to decide whether it is permissible or wise to confine youths in the same facility with adult offenders. Recently we upheld against an equal protection challenge the procedures by which juveniles were adjudicated delinquent under the New York Family Court Act, and committed to institutions also housing inmates prosecuted as adults. *United States ex rel. Murray* v. *Owens,* 465 F.2d 289 (2d Cir. 1972), *cert. denied,* 409 U.S. 1117 (1973). *See also Sonnenberg* v. *Markley,* 289 F.2d 126 (7th Cir. 1961), allowing the confinement in a federal penitentiary of youths convicted under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031 *et seq.* (1970).[5] We are, consequently,

presented with two questions on this appeal: whether there is any basis in fact for disputing the claim that these young adult misdemeanants are given identical treatment under the same conditions as adults who have committed the same offenses; and whether the combination of this circumstance with the extended reformatory sentence for young adults only, amounts to a denial of equal protection. We conclude that it does.

The Conditions of Confinement

The proper response to the respondents' claim that reformatory-sentenced inmates are in fact confined under conditions different from those imposed on adults can best be formulated by projecting the treatment of these petitioners against the background of the New York Correction Law and its elaboration in the Correctional Department's Rules and Regulations, 7 N.Y.C.R.R. (1974). Not only does the Correction Law fail to give special treatment of any sort for young adult offenders, but the implementation of the departmental rules explicitly providing for confinement under identical conditions of both adult prisoners and those serving reformatory-length terms demonstrates that there is little merit to any claim that, despite the statutorily authorized treatment, there is a de facto segregation of young adults from older inmates.

The facilities established by the recent restructuring of the Correction Law are classified in several ways. Because the institutions within the department must be maintained

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[5] It is interesting to note, however, that the act also provides: "Such commitment shall not exceed the term which might have been imposed had he been tried and convicted of the alleged violation." 18 U.S.C. § 5034 (1970). *See also Harvin* v. *United States,* 445 F.2d 675 (D.C. Cir.) (en banc) (interpreting parallel provision of the Youth Corrections Act), *cert. denied,* 404 U.S. 943 (1971).

with due regard for the safety of the community and of those in custody, the law provides for maximum, medium, and minimum security prisons. N.Y. Correction Law § 70 (6)(a) (McKinney Supp. 1974-75). Regardless of security classification, facilities are also designed to serve one or several of seven functions. *Id.* § 70 (6) (b). Three of these uses—as reception, detention, and diagnostic and treatment centers—are only of a transitory nature, since transfer may be effected once the contemplated temporary end has been served. *See id.* § 2 (5), (7), (9). The remaining four —residential treatment facilities, correctional camps, general confinement facilities, and work-release facilities—are the heart of the correctional system. In different ways, they are intended to effect the ends for which custody is imposed. Obviously, each confines the inmates for purposes of punishment, deterrence, and isolation from the community to which they might occasion danger. N.Y. Penal Law § 1.05 (4)—(5) (McKinney 1967). Each is also intended to rehabilitate the offender. *Id.* § 1.05 (5). Thus the general confinement facilities aim at "treatment of persons under institutional programs oriented to education, vocational training and industry;" N.Y. Correctional Law § 2 (10) (McKinney Supp. 1974-75); correctional camps are "maintained for the purpose of including conservation work in the program of inmates." *Id.* § 2 (8). Residential treatment facilities allow inmates "to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to [their] rehabilitation," which may include on-the-job training and employment. *Id.* § 73 (1), (2). Work-release facilities may conduct work-release programs to achieve the same goal. *Id.* § 2 (11).

The statute also provides another method of classification: departmental regulations must specify the age and sex of persons who may be confined at any of the different institutions. *Id.* § 70 (5). No indication is given, however, that the division according to age should parallel the dis-

tinction elsewhere made by length of sentence between adults and young adults between the age of 16 and 21.

Respondents contend that the failure of the Correction Law specifically to provide unique treatment for the class of young adults is not fatal, since the Department of Corrections has implemented that Law in order to confine almost all the class members in institutions reserved for offenders of similar age. More particularly, they claim that 90% of reformatory-sentenced misdemeanants are sent to the Elmira Correctional Facility, the Coxsackie Correctional Facility, or one of the camps under the jurisdiction of the Department. An examination of the departmental regulations makes clear, however, that even within those institutions youths between 16 and 21 are confined indiscriminately with adult offenders, although they must serve longer terms for identical crimes.

Pursuant to the statutory mandate, N.Y. Correction Law § 70 (5) (McKinney Supp. 1974-75), that correctional facilities be classified according to the criteria discussed above, the Department of Corrections promulgated its Designation and Classification of Correctional Facilities, 7 N.Y.C.R.R. Subchapter A (1974). Respecting the institutions in which respondents claim most reformatory-sentenced inmates are confined, those provisions state:

> 100.35 . . . The Elmira Correctional and Reception Center shall be classified as a medium security facility to be used for the following functions:
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> • • •
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> (b) General confinement facility for males between the ages of 18 and 30; provided, however, that males between the ages of 16 and 18 and males older than 30 may be placed therein for general confinement purposes in accordance with Part 100 [sic] of this Chapter; and
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> • • •

(d) Work release facility for eligible inmates.

100.45 . . .

(b) [The Coxsackie Correctional Facility] shall be a correctional facility for males between the ages of 16 and 21; provided, however, that males over the age of 21 may be placed therein for general confinement purposes in accordance with Part 150 of this Chapter.

(c) Coxsackie Correctional Facility shall be classified as a medium security correctional facility to be used for the following functions:

(1) General confinement facility . . .

100.65 . . . (a) There shall be in the department four [correctional camps]. . . .

(b) Such institutions shall be correctional facilities for males between the ages of 16 and 25.

(c) [The four camps] shall be classified as minimum security correctional facilities to be used for the function of correctional camps.

Part 150, referred to in connection with the Elmira and Coxsackie Correctional Facilities, provides:

150.1 . . .

(a) The age ranges set forth in this Chapter are basically indicators of inmate maturity level. In any case where an inmate is not within the age range specified for an institution, such inmate may nevertheless be confined therein upon specific written approval of the commissioner or of a deputy commissioner if:

(1) There are reasonable grounds to believe that such person fits in with the maturity level indicated by the age range specified for that institution; or

(2) Said institution offers a special program that can be of substantial benefit to the health, care or rehabilitation of the inmate.

We also note that Bedford Hills, the institution in which all representatives of the class are confined, is presently the only state prison for women. As to it the provisions state:

100.80

. . .

(b) Such institution shall be a correctional facility for females 16 years of age or older.

(c) Bedford Hills . . . shall be classified as a medium security correctional facility to be used for the following functions:

(1) General Confinement facility;

. . .

(4) Work release facility for eligible inmates.

Several obvious conclusions emerge from this brief review of the departmental regulations. Most significant is that, with the exception of Coxsackie, there is no institution in which young adult misdemeanants may not be mixed without distinction among older offenders. Moreover, even at Coxsackie Part 150 allows the detention of misdemeanants above the age of 21 who either may benefit from the program there, or are found to be at a level of maturity similar to the younger prisoners.* Finally, we

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*We emphasize that the integration of adults and young offenders provided for by the department's rules is carried out in

(footnote continued on following page)

emphasize the admitted fact that there is no segregation of adults from young adults within the various facilities where the members of the class are confined. In each institution listed in response to the petitioners' Request for Admissions, reformatory-sentenced inmates are commingled with adults at work, in sleeping quarters, and in the mess hall. Nor are the petitioners provided separate recreational facilities, educational programs, vocational training, counselling, drug addiction, or other programs. All inmates, regardless of the type of sentence being served, are subject to the same rules and disciplinary sanctions and enjoy the same privileges.

Perhaps even more significant than the integration of class members with adult criminals at the institutions mentioned, though, is the fact that no young adult can be assured that he will remain in—or indeed that he will be initially sent to—one of those facilities. The rules and Regulations provide, for example, that each of the maximum security prisons can be used as a detention center for those 16 and older, and as a general confinement facility for members of the petitioning class in accordance with the provisions of Part 150. 7 N.Y.C.R.R. §§ 100.5 (Attica), 100.10 (Auburn), 100.15 (Clinton), 100.20 (Green Haven), 100.25 (Ossining). Similar regulations apply to

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(*footnote continued from preceding page*)

practice. The affidavit (dated May 10, 1974) of Edward Elwin, Deputy Commissioner for Program Services in the Department of Correctional Services, admits that the Elmira, Coxsackie, and correctional camp facilities "are *basically* established and operated for the rehabilitation of young offenders. Although *individuals up to 30 years of age might be placed in Elmira,* the other facilities are *primarily* for individuals 21 years of age or younger." [Emphasis supplied.] As 7 N.Y.C.R.R. § 100.65 makes evident, the correctional camps are used for the detention of those between the ages of 16 and 25. And some idea of the frequency with which Part 150 is used at the Coxsackie Correctional Facility may be gathered from the fact that, as of December 31, 1971, 13% of those confined there were serving indeterminate sentences.

the other medium and minimum security institutions, 7 N.Y.C.R.R. §§ 100.27-100.94, most of which allow general confinement of young adults even without the approval required by Part 150. Nor is the likelihood of imprisonment in one of these facilities an empty threat. The Deputy Commissioner for Program Services in the Department of Correctional Services stated that 10% of those initially sent to Elmira, Coxsackie, or the correctional camps would be transferred after a determination that "the best interest of such inmate[s] requires a program with stronger custodial emphasis." Finally, we find it difficult to credit to any firm departmental policy even the alleged present distribution of class members among the available facilities. For the only detailed survey—made by the Department's Bureau of Research Statistics—of the places of confinement of misdemeanants serving reformatory sentences demonstrated that, as of December 31, 1971, more than half of the 316 such offenders were in facilities other than those mentioned by the Deputy Commissioner. Seventy-eight young adults were confined in maximum security prisons like Attica, Clinton and Green Haven, and only 22 were in the four correctional camps.

The Rehabilitative *Quid Pro Quo*

What we have said thus far leads us to the conclusion that there can be no rational support for the respondents' final argument. Their contention is

> that the *quid pro quo* of the extended reformatory sentence is rehabilitative treatment, and it is essentially irrelevant that a program of rehabilitation fitted to the needs of an individual inmate is either shared by other inmates or that a custodial regime suitable to the reformatory sentenced inmates may also be suitable for other inmates, or that reformatory sentenced inmates are not segregated from other inmates.

It is, of course, commendable that New York attempts to rehabilitate all convicted misdemeanants sentenced to terms of imprisonment. It is also praiseworthy that the state has tried to gear the various facilities within the jurisdiction of the Department of Corrections to achieve this end in a way which takes account of maturity, need, and the inmate's willingness to change. And yet to uphold the provisions of Article 75 would mean that one sentenced pursuant to it could be confined for four years in the same institution, under identical conditions, and with exactly the same rehabilitative program as an adult whose term could not under the law exceed three months to one year.

Respondents attempt to justify the extended confinement of young offenders by arguing that the class also receives the benefit of a correspondingly longer rehabilitative program. We are unable to follow this sleight of hand. We do not deny that, where the conditions of detention cannot be characterized as punitive, such an argument has some force. In such instances an extended sentence affords youthful offenders "not heavier penalties and punishment than are imposed upon adult offenders, but the opportunity to escape from the physical and psychological shocks and traumas attendant upon serving an ordinary penal sentence while obtaining the benefits of corrective treatment, looking to . . . social redemption and restoration." *Cunningham* v. *United States,* 256 F.2d 467, 472 (5th Cir. 1958).

Such was in fact the situation under the pre-1970 law applicable to young adult offenders. As the Practice Commentary to Section 75.10—written by the present Commissioner of Corrections, Peter Preiser—stated: the "law did not recognize any distinction based upon type of offense in dealing with . . . convicted young offenders. The four-year period . . . provided was selected as a reasonable and meaningful period for the [rehabilitative] purposes" of the statute. Rather than serving punitive ends, the law sought to offer every young misdemeanant "education, moral guid-

ance and vocational training" through the "specialized and concentrated resources" provided by the reformatories in which all were confined. *Practice Commentary, supra.*

But as is the practice elsewhere, New York has consistently recognized that its other penal institutions serve purposes in addition to rehabilitation. Explicit reference is made to the fact that confinement in those prisons serves the ends of punishment, isolation, and deterrence, N.Y. Penal Law § 1.05 (4)-(5) (McKinney 1967).[7] For precisely that reason, adult sentences have been tailored to the gravity of the offense—not to the individual's need for or amenability to rehabilitation. *Id.* at § 1.05 (4). With the repeal of N.Y. Penal Law Article 75 (McKinney 1967), *repealed,* N.Y. Laws 1974, ch. 652, § 7, the state acknowledged the necessity of employing a similar limiting principle in sentencing young adults who, since 1970, have been confined in the same correctional facilities as adults.

Thus the present penal and correctional scheme leaves the class of reformatory-sentenced misdemeanants in the anomalous position of serving extended terms when "reformatories as well as the special purposes they historically served no longer exist. . . ." They are, it is true, given rehabilitative treatment; but they are subject as well to the same punitive, deterrent, and isolating conditions as adult prisoners for substantially longer periods of time, and for this treatment we are unable to find any *quid pro quo.*

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[7] Indeed, it has been more than once suggested that the prisons of our country have not been rehabilitating prisoners. *See, e.g.,* W. Amos, *The Philosophy of Corrections: Revisited,* 38 Federal Probation 43, 45 (1974); I. Kaufman, *Prison: The Judge's Dilemma,* 41 Fordham L. Rev. 495, 499-503 (1973); Hearings before the Sen. Jud. Comm. on Juvenile Delinquency, 91st Cong., 1st Sess., 5194 (1971).

III.

Having examined the merits of the petitioners' claims, we must still consider several vexing procedural issues: whether this habeas corpus proceeding is maintainable as a class action; whether, in light of 28 U.S.C. § 2241 (d) (1970), the class may appropriately embrace all young adult misdemeanants held in custody by the state of New York, or must instead be limited to those in custody or convicted and sentenced in the Southern District of New York, where the action below was brought; and finally, what action may be deemed to satisfy the exhaustion requirements upon which federal collateral relief to state prisoners is conditioned. For the reasons stated below, we find that the class was properly allowed to proceed as defined by the district court.

CLASS ACTION

Although habeas corpus proceedings are referred to as "civil proceedings," the Federal Rules of Civil Procedure are applicable only "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Fed.R.Civ.P. 81(a)(2). The relevant statutory provisions, 28 U.S.C. §§ 2241 *et seq.* (1970), offer little help when the petitioners are numerous. Moreover, the "conformity" provision of Rule 81 has been interpreted by the Supreme Court to dictate explicit applicability of the Rules only in those areas of habeas practice which prior to the enactment of the Rules had utilized the modes of civil practice. *Harris* v. *Nelson*, 394 U.S. 286, 294 (1969). Relying upon the significant expansion of the discovery provisions in the 1938 Rules, as well as the burden which their full implementation would impose upon prison officials, the

Harris Court decided that the conformity clause did not permit use of Rule 33 interrogatories in habeas actions. Similar considerations impel us to conclude that the class action device should not be imported into collateral actions, at least in its full vigor as contemplated by Rule 23. Like Rule 33 discovery, even the original and more restrictive version of Rule 23 which was adopted by the Rules Enabling Act represented a rather "bold attempt" to encourage class actions, a form of relief traditionally confined to equity practice. C. Wright, Law of Federal Courts, § 72 at 306 (2d ed. 1970); Advisory Committee Notes, Fed. R.Civ.P. 23. There is little evidence, moreover, that even the narrower pre-1938 multi-party proceedings enjoyed any considerable application in habeas corpus actions. Note, Multiparty Federal Habeas Corpus, 81 Harv. L. Rev. 1482, 1493 (1968). Finally, we would hesitate to impose on judicial and correctional officials, by approving full employment of Rule 23, the very substantial burdens of discovery and proof which would be required to rebut even the most frivolous allegations—made "generally without the guidance or restraint of members of the bar," *Harris, supra,* at 297—that an inmate's complaint involved predominant questions of law or fact applicable to numerous other prisoners.

To say that the precise provisions of Rule 23 do not apply to habeas corpus proceedings, however, is *toto coelo* different from asserting that we do not have authority to fashion expeditious methods of procedure in a specific case. *Harris* confirms the power of the judiciary, under the All Writs Act, 28 U.S.C. § 1651 (1970), to fashion for habeas actions "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage." 394 U.S. at 299. We find in the unusual circumstance of this case a compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure. Our conclu-

sion is based in large measure upon the nature of the claim here presented by Sero and the other young adult misdemeanants whom she would represent. As the discussion of that claim in the preceding section made clear, the charge that the four-year reformatory sentence violates equal protection is applicable on behalf of the entire class, uncluttered by subsidiary issues. Since the 1970 restructuring of the correctional system the treatment which young adults have received, as well as all other conditions of custody, have been identical to those afforded adult misdemeanants.

A number of other persuasive justifications enforce our conclusion that the class action device was appropriately used in this case. Because many of those serving reformatory sentences are likely to be illiterate or poorly educated, and since most would not have the benefit of counsel to prepare habeas corpus petitions, it is not improbable that more than a few would otherwise never receive the relief here sought on their behalf. *See Developments in the Law —Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1170-71 (1970); *Adderly* v. *Wainwright,* 58 F.R.D. 389, 405 (M.D. Fla. 1972). Considerations of economy also argue persuasively for such a result. The considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue is thereby avoided, *Williams* v. *Richardson,* 481 F.2d 358, 361 (8th Cir. 1973), as is the expense which would be incurred in appointing counsel for each individual who proceeded on his own.[8]

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[8] In finding class treatment appropriate we do not ignore two further peculiarities of the statutory provisions applicable to habeas corpus proceedings. It is true that, although two earlier versions of the Great Writ were phrased in the plural, Act of Aug. 29, 1842, ch. 257, 5 Stat. 539; Act of Mar. 2, 1833, ch. 57,

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Appendix A.

Although we trust it is clear that the precise provisions of Rule 23 are not applicable to these proceedings, our conclusion that an analogous procedure may be employed in this case is bolstered by the Federal Rules' delineation of the circumstances which make multi-party actions appropriate. Four prerequisites to a class action are specified by Fed.R.Civ.P. 23(a): (1) the class must be no numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the representative parties must be typical of those made by the class; and (4) it must be shown that the representative parties will fairly and adequately protect the interests of the class. There is no

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(*footnote continued from preceding page*)

§ 7, 4 Stat. 634, the present Code speaks only in the singular, *see, e.g.*, 28 U.S.C. § 2241 (1970). It seems clear, however, that the change was intended to be more stylistic than substantive, and the courts have frequently entertained joint applications by petitioners convicted at a joint trial. *See, e.g., United States ex rel. Poret* v. *Sigler*, 361 U.S. 375 (1960); *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *United States ex rel. Kozicky* v. *Fay*, 248 F.2d 520 (2d Cir. 1957), *cert. denied*, 356 U.S. 960 (1958).

A less frivolous objection to issuance of the writ on behalf of a large class is that 28 U.S.C. § 2242 (1970) requires that an "[a]pplication . . . be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." We find here, however, convincing reasons for holding that the application for the petitioners—all between the ages of 16 and 21 at conviction—has been executed by "someone acting in [their] behalf." This court has recognized for more than half a century that "[t]here are many instances and circumstances under which it may not be possible nor feasible that the detained person shall sign and verify the complaint. Inability to understand the English language or the situation . . ., impossibility of access to the person, or mental incapacity are all illustrations of a proper use of the 'next friend' application." *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (2d Cir. 1921). It would seem appropriate to recognize that the age and competence of most members of the class make it unlikely that they would avail themselves of the relief here sought on their behalf.

question but that joinder in this case would have been impracticable, if not impossible. The more than 500 members of the class—many of them unidentifiable at the time the action was commenced—far surpass the requirements of numerousness which have been imposed in more straightforward civil actions. *See, e.g., Cypress* v. *Newport News Gen. & Nonsectarian Hosp. Assn.*, 375 F.2d 648, 653 (4th Cir. 1967) (eighteen); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261, 264 (8th Cir. 1944) (forty). And although we believe that more stringent standards may be appropriate in deciding whether a habeas action presents substantial and common questions of law or fact, it is apparent that the complaint of the representative parties in this suit states a clear and unitary allegation on behalf of all young adult misdemeanants. *Cf. Gesicki* v. *Oswald*, 336 F.Supp. 371 (S.D.N.Y. 1971), *aff'd*, 406 U.S. 913 (1972). And, although we are informed that the facilities at Bedford Hills differ from those at many of the other state correctional institutions, that factor is irrelevant to our purposes. This is so because the petitioners do not charge that the state has failed to confine them in the existing institutions best suited to their needs, but that an unconstitutional distinction is made among inmates of each institution—all receiving the same treatment—solely by reason of age. Finally, we find it clear that the representative parties have fairly and adequately protected the interests of the class. The district court found, and we agree, that the parties have been represented throughout by conscientious and experienced counsel, 351 F.Supp. at 528, and they have vigorously prosecuted the claim on behalf of the other members.[9]

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[9] What we have said, *supra*, concerning the nature of the claim made by all members of the class confirms our view that this action is at least as appropriate for class treatment as those to which the

(footnote continued on following page)

Appendix A.

SECTION 2241 (d)

Even if this action may be appropriately maintained as a class action, the respondents claim that the district court did not have jurisdiction over all the members of the class to whom its decree would extend. Although all the representative petitioners were, at the time this action was begun, confined at the Bedford Hills Correctional Facility, we are told that some members of the class were neither confined nor convicted within the Southern District of New York. Therefore, the argument concludes, the district court was deprived of jurisdiction as to these persons by 28 U.S.C. § 2241 (d) (1970), which provides:

> Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him. . . .

A proper understanding of § 2241 (d) requires a brief elucidation of its relationship to § 2241 (a).

(*footnote continued from preceding page*)

further provisions of Rule 23 would apply. It is clear that subsection 23 (b) states conditions in addition to those set out in the first subsection of the rule, since it defines the nature of claims most appropriately entertained in a unitary proceeding. But the situation before us is strongly analogous to the (b) (2) class action, in which "the party opposing the class has acted or refused to act on grounds generally applicable to the class. . . ." F.R.Civ.P. 23 (b) (2). Further, a decision on the constitutionality of detention under Article 75 would, as a practical matter, most likely be dispositive of the interests of the other members not parties to the adjudication. *Cf. Atlantis Dev. Corp.* v. *United States*, 379 F.2d 818, 826-29 (5th Cir. 1967); *Nuesse* v. *Camp*, 385 F.2d 694, 701-02 (D.C. Cir. 1967).

Appendix A.

The general grant of habeas corpus jurisdiction has long provided that the Supreme Court, any of its justices, any circuit judge, or any district court could grant the writ "within their respective jurisdictions." 28 U.S.C. § 2241 (a) (1970), *formerly* 28 U.S.C. § 452 (1940). *See* Act of Feb. 13, 1925, ch. 229, § 6, 43 Stat. 940; Rev. Stat. § 752; Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. In 1948 that provision was interpreted to mean that a district court lacked subject matter jurisdiction to grant the writ on behalf of a prisoner who was not confined within its territorial boundaries. *Ahrens* v. *Clark*, 335 U.S. 188 (1948). It rapidly became apparent, however, that *Ahrens* was a self-inflicted judicial wound. The court nearest the place of confinement was, perhaps more often than not, by no means the most convenient forum for resolution of the dispute raised by a habeas petition. All the material events would usually have taken place, and all the records and witnesses were generally to be found, near the court which had originally imposed the confinement. Moreover, restriction of jurisdiction to the locus of confinement had the singular disadvantage of imposing on those district courts near detention facilities the burden of entertaining all collateral actions brought by inmates in those prisons. In an effort to rescue the courts from a calamity of their own making, Congress in 1966 enacted § 2241(d), which specified that a habeas corpus petition could also be filed in the federal district in which the court which had entered judgment and sentence was located. *See* S. Rep. No. 1502, 89th Cong., 2d Sess. (1966); H.R. Rep. No. 1894, 89th Cong., 2d Sess. (1966).

Helpful though it was, the remedy was not complete enough to undo the damage done by *Ahrens'* narrow jurisdictional interpretation of § 2241 (a). The inadequacy was most convincingly demonstrated by the problem of interstate detainer. In *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), an inmate confined in an Alabama

state prison after a felony conviction applied for habeas corpus relief in the Federal District Court for the Western District of Kentucky, seeking to attack a pending Kentucky indictment. Relying in large measure upon the liberalization of intrastate habeas effected by § 2241 (d), as well as the post-*Ahrens* provision of 28 U.S.C. § 2243 (presence of petitioner not required when application presents only issues of law), the Court held that:

> So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" [for purposes of § 2241(a)] . . ., even if the prisoner himself is confined outside the court's territorial jurisdiction.

410 U.S. at 495. With respect to Braden's claim the state of Kentucky was the real custodian, since for purposes of the detainer pursuant to the pending indictment the Alabama correctional officials acted only as agents. Thus the federal district court in Kentucky had jurisdiction to issue the writ.

This straightforward reading of § 2241 (a), as the Court certainly realized, was not without its effect upon the interpretation to be given § 2241 (d). If the original jurisdictional grant in § 2241 (a) was to be construed as coextensive with the scope of service of process, *see* Fed.R.Civ.P. 4 (f), then a jurisdictional reading of § 2241 (d) would render that subsection merely repetitious. The *Braden* Court recognized, further, that the 1966 amendment was motivated, at least in part, by "a desire to insure that the disputes could be resolved in the most convenient forum," 410 U.S. at 497 n. 13, i.e. by considerations traditionally proper to venue. We think it clear, from both the Court's language and the language of § 2241 (d), that it makes more sense to read this section as a provision fixing venue and aimed at problems of judicial

administration whose solution lies in the balance of convenience among various courts. *Cf.* 83 Harv. L. Rev. at 1161-65.

Before proceeding to a discussion of the venue requirements for this class action, however, we feel constrained to indicate that we need not rest our decision that the district court had jurisdiction over the entire class upon our interpretation of § 2241 (d). For even if—contrary to the clear implication of *Braden*—that section is to be read as jurisdictional, we find compelling reasons for concluding that Congress did not intend the section to preclude determination in one forum of multi-party actions. The parallel practice in Rule 23 class actions provides a basis for our decision. Although the statutory grant of diversity jurisdiction, 28 U.S.C. § 1332 (1970), has from its inception been interpreted to require complete diversity among opposing parties, *Strawbridge v. Curtiss*, 7 U.S. [3 Cranch] 267 (1806), it is almost equally well-settled that a class action may satisfy § 1332 if there is diversity only between representative plaintiffs and the defendants. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). The distinction is not difficult to fathom. Limitation of the class in order to achieve diversity would also

> result in the determination of the rights of most of the class by a decree rendered upon a theory which may be repudiated in another forum as to a part of the same class.
>
> . . . If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.

Id. at 366-67. Similar considerations argue persuasively for a like interpretation of § 2241 (d), if, indeed, it is to be read as jurisdictional. The interests of judicial economy, the need for fairness among prisoners similarly situ-

ated, and the desirability of certainty in the law, all demand a conclusion that will not deal with only some members of the prospective class in such a manner as to leave open to the possibility of contrary result in another court." Since the representatives of the class in this case—all inmates at the Bedford Hill Correctional Facility—could properly have proceeded individually in the court below, we find that Judge Lasker correctly concluded that he had jurisdiction over the entire class.

Whether venue in the S.D.N.Y. was proper as to all class members is a question which need not detain us. The practice in Rule 23 class actions once again furnishes a guide to our decision. Although the same statutory provisions determine venue for Rule 23 as for nonclass actions, 28 U.S.C. § 1391 (a) (1970) (diversity actions may be brought only in the district where all plaintiffs or all defendants reside, or in which the claim arose) may be satisfied if only the named parties to a class action meet its requirements. 3B Moore's Federal Practice ¶ 23.90 (1974); C. Wright, Law of Federal Courts § 72, at 355

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[*] We are mindful of the Supreme Court's recent ruling affording stricter enforcement to the jurisdictional provisions defining "amount in controversy." 28 U.S.C. § 1332 (1970). *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *See also Snyder v. Harris*, 394 U.S. 332 (1969). Those decisions, however, rested in large measure on the need to protect the jurisdictional limitation against expansion by aggregation of claims, 394 U.S. at 339-40, or by allowing "'one plaintiff [to] . . . ride in on another's coattails.'" 414 U.S. at 301. This consideration is irrelevant to the present action. We do not have before us a case where the class action device would admit into the federal court petitioners who otherwise would be unable to meet jurisdictional requirements, since each member could proceed independently in the jurisdiction of his confinement or conviction. A reading of § 2283 (4) consistent with *Supreme Tribe of Ben Hur* not only avoids the undesirable inconsistencies upon which that decision turned, but also has the advantage of reducing litigation which could otherwise go forward only in numerous individual actions.

(2d ed. 1970). *See Dale Electronics, Inc.* v. *R.C.L. Electronics, Inc.*, 53 F.R.D. 531, 538 (D.N.H. 1971); *Research Corp.* v. *Pfister Assoc. Growers, Inc.*, 301 F.Supp. 497, 501 (N.D. Ill. 1969). Here too, the rationale is not difficult to comprehend. The same need for consistency, fairness and economy which dictated a common-sense construction of the jurisdictional provisions applies as well to those determining venue.

It is clear to us that the representative petitioners satisfy the habeas corpus venue requirements, whether they are to be defined by § 2241 (d) or otherwise.[11] Each named petitioner was confined in the district in which the action was brought. Moreover, little added inconvenience was imposed upon the respondents by requiring them to defend against the other class members' claims, which were identical to those of the representative parties.

EXHAUSTION

The requirement that a state prisoner must first exhaust all state remedies before proceeding with a collateral attack in the federal court is set forth in 28 U.S.C. § 2254 (b). The exceptions to this rule are instances where "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." *Id.* It is clear that two of the named plaintiffs, Lois Sero and Rita Varner, as well as another member of the class, Myletta Joyner, have fully complied with the provisions of § 2254 (b). *See* 351 F.Supp. at 525 n.3. Thus, the only question with which we are presented is whether their

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[11] In *Braden*—since the case involved the problem of interstate detainer—there was no applicable venue statute. The Court nonetheless based its choice of forum upon "traditional venue considerations." 410 U.S. at 493, 499 n.15.

actions may be taken to fulfill the exhaustion requirements on behalf of the class. We find that they may.

The statutory exhaustion provisions serve two salutary purposes. Depriving state courts of the first opportunity to pass on federal constitutional questions would eventually have the unhappy effect of making those courts callous to and ignorant of federal claims. Moreover, other considerations of federalism make clear that it is wise that a federal court decline to inject itself into the orderly administration of state judicial business. But state remedies have been characterized as "ineffective" for purposes of § 2254 (b) not only because they were procedurally inadequate, but also where recent state holdings on a question of substantive law demonstrated that relitigation of the same issue would have proven futile. *See, e.g., Reed* v. *Beto,* 343 F.2d 723 (5th Cir. 1965), *aff'd on other grounds sub nom. Spencer* v. *Texas,* 385 U.S. 554 (1967); *Evans* v. *Cunningham,* 335 F.2d 491 (4th Cir. 1964); *Dana* v. *Tracy,* 360 F.2d 545, 548 (1st Cir.) (dictum), *cert. denied,* 385 U.S. 941 (1966). This "futility" doctrine, of course, comports with the policies underlying the demand for exhaustion in the ordinary case. We must be sure that the state court has had the opportunity recently to consider the identical claim. Moreover, its decision of the issue must be so clear that any further consideration given similar cases by the state court is likely to be summary, so that a federal court entertaining such a case is not likely to disrupt state judicial administration.

These same considerations lead us to the conclusion that the exhaustion requirements for the petitioning class have been met by the actions of Sero, Varner, and Joyner. The state court proceedings brought by these three presented an identical challenge to the constitutionality of §§ 75.00 and 75.10. Applications for leave to appeal to the New York Court of Appeals were denied on April 20 and

on May 16, 1972, less than six months before Judge Lasker's first decision permitting class status. Under these conditions, we are unwilling to impose upon other members of the class the burden of inundating the state courts with applications which would be as time-consuming as they would be useless.

IV.

What we have said thus far demonstrate that issuance of writs granting release was proper as to those young adults—either in confinement or on parole—who served more time in correctional facilities than the maximum terms provided for adults guilty of the same misdemeanors. We also believe it is clear that those who on the effective date of the district court's decree had not yet been released on parole, but had at that time served less than the corresponding adult terms, were properly entitled to resentencing.[12] There remains to be determined, however, the treatment due those class members who were already on parole at the time of the decree below, after having served shorter terms in prison than would have been given to adult class A and class B misdemeanants. As to this group the district judge granted release to those whose total time in custody exceeded the maximum adult sentence, and ordered resentencing for the remainder. With this latter determination, we do not agree.

Although extensive discovery was had on the issue of treatment given young adults in correctional facilities, the only evidence relevant to the conditions of parole discloses an issue which we are unable to resolve on the record be-

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[12] Because we find it impossible to assess the likelihood that these inmates will be released on parole before they have served adult-length sentences, we find resentencing a more appropriate treatment than that given the remainder of the class, *infra*.

fore us. *See U. S. ex rel. Bradshaw* v. *Alldredge*, 432 F.2d 1248 (2d Cir. 1970). The Statement of Substantial Undisputed Facts submitted by the petitioners on their motion for summary judgment states:

> 17. There is no special parole service for reformatory-sentenced offenders except that assigned case loads of "Youthful Offenders" (males only) are made to certain parole officers in New York City.

The respondents' answer, however, "dispute[d] the allegation that the only special parole service which is available to reformatory sentenced inmates concerns Youthful Offenders." Although Judge Lasker properly found that identical conditions of confinement justified release or resentencing as to part of the class, he made no such determination regarding the parole services available to young adults and adults respectively. Because the provision of unique services would under some circumstances justify a longer period of parole, we remand this issue for further factual determinations and disposition consistent with this opinion. In all other respects we affirm.

APPENDIX B

Final Order and Memorandum of the United States District Court for the Southern District of New York, dated June 26, 1974.

MEMORANDUM

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 778

UNITED STATES EX REL. LOIS SERO, VANESSA CARNEY, RITA VARNER, EDNA GRIFFIN, DAISY JOHNSON, LINDA FELONG, DIANE PIACENTINE, SUSAN PASNICK, JUDY SPRATLING, and all other persons similarly situated,

Petitioners,

against

PETER PREISER, Commissioner of the New York Department of Correctional Services; FRANCES CLEMENT, Warden of Bedford Hills Correctional Facility, Bedford Hills, New York; ROBERT HENDERSON, Superintendent of the Auburn Correctional Facility, Auburn, New York; VITO TURNELLO, Superintendent of the Elmira Correctional Facility, Elmira, New York, and all other persons similarly situated; PAUL J. REGAN, Chairman of the New York Parole Board; and MALCOLM WILSON, Governor of the State of New York,

Respondents.

Appendix B.

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LASKER, D.J.

The continuous procession of motions in this action which challenges the constitutionality of Article 75.00 of the Penal Law of New York is now augmented by petitioners' alternative motions for full or partial summary judgment. The vicissitudes of the case have called upon us before this to write a textbook's worth of opinions on various facets and issues.[1] It is unnecessary at this writing to review the facts, or to redefine the legal parameters

of the proceeding, all of which are exhaustively—and somewhat exhaustingly—expounded in the earlier decisions.

Petitioners presently ask us to grant either 1) full summary judgment declaring that Article 75 is unconstitutional as applied or, in the event that application is denied, 2) partial summary judgment ordering that each member of the petitioning class be resentenced at a hearing, augmented by findings as to his or her reformability and, if an Article 75.00 sentence is imposed, a statement of reasons for its imposition.[2]

The first leg of the motion stands on the claim that the undisputed facts establish that the statute as applied does not afford petitioners the special rehabilitative treatment which is the *quid pro quo* for the extended term which it authorizes. We have ruled in earlier opinions in this case that if such allegations were proven the statute would indeed be unconstitutional as applied.[3]

Petitioners' rationale is based on a statement contained in a Memorandum of February 4, 1974, submitted by the New York State Department of Correctional Services in relation to Assembly Bill 9375 providing for the repeal of Article 75. That bill has now become law, and Article 75 has been repealed, but prospectively only, so that petitioners' attack on the validity of the statute is not moot as to them. In its Memorandum, which supported the bill to repeal Article 75, the Department commented:

> "This bill is a logical culmination of the restructuring of the State correctional system which was commenced by the legislature in 1970 when it created the Department of Correctional Services and abolished the distinction between reformatories and State prisons.
>
> As provided by the 1970 legislation, Article 4 of the Correction Law mandates that every institution operaed by the Department of Correctional Services

for the confinement of inmates (except institutions for the mentally ill or mentally defective) shall be a correctional facility maintained for the purpose of providing places of confinement and treatment with the objective of assisting inmates to live as law-abiding citizens. Correctional facilities are classified by functions, such as residential treatment facilities, general confinement facilities and work release facilties. Individuals, regardless of the type of sentence they are serving, are confined in institutions best suited to their needs. For purposes of confinement, treatment, education and vocational training, persons serving reformatory or indeterminate sentences are treated in accordance with rehabilitative goals rather than the type of sentence they are serving. Since reformatories as well as the special purposes they historically served no longer exist, there is no longer a need for reformatory sentences.

Moreover, the sentence is unfair in that it treats young adults (persons 16 to 21) more harshly than adults."

Petitioners argue as to this passage that:

"[T]he Department's admission in the Department's legislative Memorandum accompanying A.9375 that separate treatment can no longer exist in New York makes it clear that there is no more purpose to the reformatory sentence, no matter where served. It is for this reason that Article 75 has been repealed.

The rationale for this repeal is not limited just to reformatory sentences that are imposed after the effective date of the Act. The rationale is based on a fundamental decision about correctional methods made back in 1970, which 'abolished the distinction between state prisons and reformatories.' That decision made it irrational and inappropriate to impose reformatory

> sentences not only on people sentenced after the enactment of this repeal legislation, but on all sentences imposed and being served after 1970." Memorandum at 2-3.

From this analysis petitioners conclude that the defendants have now admitted away the case, that is, have admitted the key allegation of the complaint[4] contained in Paragraph 9(a) that the authorization of "one-to-four year reformatory sentences for offenders, like petitioners, which would ordinarily result in a one-year maximum (and usually less) for persons over 21 . . . are unconstitutional," because they treat "such persons [i.e. petitioners] worse that they treat persons over 21 who commit the same offense, for no compelling or even rational basis."

In judging the soundness of this argument, we return to first principles, that is, to the circumstances which we and other courts have found must exist to justify the constitutionality of imposing a substantially longer ("extended") sentence on a young adult offender than on an adult who commits the same crime.

In the earliest of our opinions in the case we wrote:

> "[T]he rational basis which sustains the discrimination between 'young adults' and adults in the Penal Law is the same as that which underlies the federal statute, namely, the amenability of young offenders to rehabilitation through special treatment." 351 F. Supp. at 528 (footnote omitted).

We then quoted Chief Justice (then Judge) Burger's opinion in *Carter* v. *United States,* 306 F.2d 283, 285 (D.C. Cir. 1962) that "the basic theory of that Act [the Federal Youth Corrections Act, the constitutionality of which the parties here agree is premised on the same rationale as New York's statute] is rehabilitative and in a sense this rehabilitation may be regarded as compris-

ing the *quid pro quo* for a longer confinement *but under different conditions and terms than a defendant would undergo in an ordinary prison*" (Emphasis added).

We did not, in our earlier opinion, dwell on the requirement that, in addition to rehabilitative treatment, a young adult was entitled to be held in custody, as *Carter* specified, "under different conditions and terms than a defendant would undergo in an ordinary prison," because the issue upon which the parties focused at that opening stage of the litigation was whether petitioners were being accorded rehabilitative treatment at all. The factual context of the case has changed, however, and the question is now squarely presented whether petitioners are entitled, not only to a rehabilitative program, but also to be held in custody "under different conditions and terms than a defendant would undergo in an ordinary prison." The changes in the factual context consist first, of the admissions by respondents[5] that the conditions under which petitioners are being held are *no different* from those which the ordinary prisoner undergoes, evidence as to a critical matter which had not been developed at the time of our earlier opinion, and second, of the Commissioner of Corrections' statement in the Memorandum, cited above, supporting Assembly Bill 9375 that "[s]ince reformatories, *as well as the purposes they historically served* no longer exist, there is no longer a need for reformatory sentences" (emphasis added).

We believe that this forceful and unconditional assertion by the highest correctional authority in the state must be regarded as admitting that, in the context of the state's present framework of penal institutions—in which *both* persons serving reformatory sentences (the petitioner class) and those serving indeterminate sentences (adults) "are treated in accordance with rehabilitative goals rather than the type of sentence they are serving"—there is no longer any justification for imposing a substantially longer

sentence on the petitioner class than on adult offenders convicted of committing the same crimes.

It is no answer to say, as respondents assert, that if young adults are more amenable to rehabilitation than adults, the state may impose extended sentences on the former group to assure their rehabilitation. Putting aside that the premise of a young adult's greater susceptibility to rehabilitation is in issue in this case, we find it more reasonable to conclude that if indeed young adults *are* more amenable to rehabilitation than their elders, the result should be that their sentences—if they vary from that of adults—ought to be shorter (where the programs offered to each class are the same, as they now are in New York) rather than longer. The state's argument that it is justified in holding young adults in custody longer because they are *more* amenable to rehabilitation than older prisoners is of a piece with that offered and rejected in *Gesicki* v. *Oswald,* 336 F. Supp. 371 (S.D.N.Y. 1971) (three judge court), *aff'd* 406 U.S. 913 (1972). In *Gesicki,* which held the New York Wayward Minor Act to be void for vagueness, Chief Judge Kaufman disposed of the state's argument that its role as *parens patriae* justified the statute, observing that:

> "This has been the reasoning relied upon by innumerable courts in the past to sustain the constitutionality of statutes regulating or 'protecting' juveniles by standards equally as vague and all-embracing as that before us. *See, e.g., State* v. *L.N.* 109 N.J. Super. 278, 263 A.2d 150 (1970); *People* v. *Deibert,* 117 Cal. App. 2d 410, 256 P.2d 355 (1953). It is a rationale which has its roots deep in the history of this country's praiseworthy efforts to treat *troublesome* juveniles differently than adult criminals. *See* Ex parte Crouse, 4 Whart. 9 (Pa. 1838) (commitment to house of detention for 'incorrigible conduct'). *See generally* Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187, 1198ff. (1970)." *Id.* at 376.

Appendix B.

In sum we find that while imposition of extended sentences may meet the requirements of the Equal Protection clause, as we and earlier courts have held, when defendants so sentenced are differentially treated from other defendants, the command of the clause is violated when the sentence is longer but treatment and all other conditions of custody are the same. It would be a distortion of the equal protection clause to hold that it permits the imposition of an extended sentence on a young adult just because he or she is young.

Our conclusion that this is a sound analysis of the facts and issues now before us is strengthened by the views set forth by the New York Supreme Court in *People ex rel. William Cromwell* v. *Warden,* Index #442/1973 (Bronx Co., June 13, 1973), construing the rights of reformatory sentenced defendants. There the court wrote:

> "In all other respects relators stand on the same plane as those committed to the correctional institution. Although relators are accorded treatment appropriate to reformatory inmates, the testimony makes clear that the programs obtaining in C-90 and C-76 are substantially identical. Indeed, most are participated in jointly by both sets of prisoners. Where a program available at one institution is not available at the other, a counterpart is furnished. Although the law mandates that the minimum parole date be fixed earlier for those sentenced to reformatories, the standard applied in fixing those dates is the same. In short, the treatment accorded the reformatory inmate and the prisoner sentenced to an indefinite term is, in substance, identical.
>
> It may well be that the distinction between the two had 'some rational basis' (McGinnis v. Royster, supra, p. [270], 93 S.Ct., 1055, 1059) at a time when the concept of treatment was limited to reformatories only

> and when segregation of the young from the hardened recidivist was deemed essential to rehabilitation. However, the 1970 amendments to the Correction Law expanded the theory of treatment to include all prisoners beneath its umbrella; and it is clear, from the record in this case as well as from other reported cases (People ex rel. Meltzner v. Follette, supra; People v. Jiminez, supra) that segregation of reformatory inmates is no longer the rule. Hence, the 'rational basis' which originally justified the disparity in treatment has been swept aside by the forward movement of the state's correctional policy." *Id.* at 18-19.

The state's arguments *contra* are not persuasive, if it can be said that they meet the issue at all. We agree with its undeniable contention—referring to the fact that adults as well as young adult prisoners are now offered rehabilitation in the New York scheme—that "[t]here is no constitutional prohibition in the State wishing to attempt to rehabilitate as many people as it can." (Memorandum in Opposition at 22.) However, it does not follow that because the state is constitutionally free to offer rehabilitation to all prisoners it is free to discriminate among prisoners convicted for the same crimes, housed in the same institutions and treated according to the same plan, by imposing substantially longer sentences only on those who are younger than 21.

We agree also with the state's assertion that courts have generally held that as long as a rehabilitative program is available, the place of incarceration does not raise a constitutional issue. But it is not the place of incarceration that we are exclusively, or even primarily concerned with. Rather it is the complex of conditions which results not only in a young adult being housed in the same institution, but being treated in *every other way* identically with his older fellow inmates. As the Commissioner's Memoran-

dum itself advised the State Assembly, the result of this identity of housing and treatment is not only that there are no longer any reformatories in New York State but, what is critical, that "the special purposes they historically served no longer exist" and, consequently, "there is no longer a need for reformatory sentences."

Our conclusion that Article 75.00, under the present circumstances, violates constitutional requirements renders most petitioners' alternative motion that, because no previous determination has been made as to whether they are in fact rehabilitable, they be resentenced.

Petitioners' motion for summary judgment declaring Article 75.00 invalid to the extent that it authorizes the imposition of extended sentences on members of the petitioner class is granted. The application for writs of habeas corpus for members of the petitioner class is granted, and the members of the class shall be discharged unconditionally from custody, except that, in the case of any member of the class who has not yet served a sentence no longer than could have been imposed upon him or her as an adult, he or she shall be discharged unless within thirty days hereof he or she is lawfully resentenced.

Submit order on notice.

Dated: New York, New York
June 26th, 1974.

Robert J. Lasker
U.S.D.J.

Appendix B.

FOOTNOTES

[1] 351 F. Supp. 522 (1972); 355 F. Supp. 1231 (1973); 372 F. Supp. 660 (1974); 372 F. Supp. 663 (1974).

[2] An additional aspect of the motion, that §§ 803 and 804 of the New York Correction Law be declared unconstitutional insofar as they fail to provide petitioners time off for good behavior even though petitioners (reformatory—sentenced inmates) are not otherwise treated differently from other inmates who are allowed such time off, has been rendered moot by the enactment of Chapters 652 and 653 of the 1974 Session Laws which together retroactively grant such time off to persons in the petitioning class.

[3] 351 F. Supp. 522, 528 (1972); 372 F. Supp. 663, 670 (1974).

[4] Petitioners' memorandum does not specify which allegations of the complaint are claimed to have been admitted, but those contained in Paragraph 9(a) appear to be in point.

[5] We list, as illustrative, the following admissions. There are no longer any institutions in the Department of Corrections which are designated as reformatories. Answer, March 12, 1974, to Amended Petition, p. 8, par. 7c. Persons sentenced to both reformatory sentences and indeterminate felony sentences are confined in all of the State's correctional facilities. This is an old admission. Answer, June 22, 1972, to petitioners' Interrogatories, par. 1, 2a. In these facilities, reformatory-sentenced inmates are commingled at work, recreation, in sleeping quarters and in the mess hall. Answers to petitioners' Requests for Admissions, par. 2. The petitioners' class members are not provided separate recreational facilities (Answers, March 22, 1973, to petitioners' Supplemental Interrogatories, par. 8), educational programs (*id.*, par. 22), vocational, training, counselling, drug addiction, special rehabilitative or other programs (*id.*, par. 25). All inmates, regardless of the type of sentence they are serving are subject to the same rules and disciplinary sanctions (*id.*, par. 6a) and enjoy the same privileges (*id.*).

APPENDIX C

Final Order of the United States District Court for the Southern District of New York, dated July 11, 1974.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

72 Civ. 778 (M.E.L.)

ORDER

UNITED STATES ex rel. LOIS SERO, *et al.*,

Petitioners,

against

PETER PREISER, *et al.*,

Respondents.

June MEL

WHEREAS, by memorandum opinion dated ~~July~~ 26, 1974, this Court has granted petitioners' motion for summary judgment declaring Article 75.00 of the New York Penal Law unconstitutional as applied to the extent that it authorizes the imposition of extended sentences on members of the petitioner class, and has granted the application for writs of habeas corpus for members of the petitioner class; and

WHEREAS respondents have requested a stay of this Court's Order pending appeal; the Court hereby:

1. DECLARES that petitioners may maintain this action as a class action pursuant to Rule 23(b)(1)(2), F.R. Civ. Proc., which class shall consist of all persons who have been sentenced to a reformatory sentence under New York Penal Law Article 75.00 upon conviction of misdemeanors

only, or upon a Youthful Offender determination following conviction of misdemeanors only; and

2. DECLARES that Article 75.00 of the New York Penal Law, as applied, violates the Equal Protection Clause of the United States Constitution to the extent that it authorizes imposition, upon persons sixteen to twenty-one years old, of sentences longer than those that may be imposed upon persons convicted of the same crimes who are over twenty-one years old; and

MEL

3. ORDERS that within 30 days of the date of this Order, respondents effect the unconditional discharge of all members of the petitioner class in their custody, including those on parole, who by that date will have served on their reformatory sentences, in prison or on parole, a combined period of time equal to or greater than the maximum definite term that could have been imposed for the misdemeanors of which they were convicted; and further

4. ORDERS that, within 30 days of the date of this Order, respondents effect the unconditional discharge from custody of all other members of the petitioner class in their custody who are not released pursuant to Paragraph 3 of this Order, except that respondents may retain custody of any such person for lawful resentencing if, by that date, notice has been given to counsel for petitioners that such person is to be resentenced; and further

5. ORDERS that within 40 days of the date of this Order, respondents effect the unconditional discharge from custody of any person retained in their custody pursuant to Paragraph 4 of this Order who has not by that date been resentenced and committed to their custody pursuant to a valid sentence; and further

6. ORDERS that, by July 23, 1974, respondents produce the court and
EL for ^ counsel for petitioners a list of the names, identification numbers, misdemeanors of which convicted or upon which a Youthful Offender determination was made, and current location or assigned parole officer, of all members of the petitioner class presently in their custody, including those on parole; and further

the court and

7. ORDERS respondents to deliver to ^ counsel for petitioners a copy of the document effecting discharge, or other appropriate evidence of discharge, with respect to each member of the petitioner class following his or her discharge pursuant to this Order; and further

8. DENIES, for the reasons set forth in the attached Memorandum, a stay of this Order except that this Order is stayed until July 16, 1974, to permit respondents to make application to the Court of Appeals for a stay pending appeal.

DATED: New York, New York
July 11, 1974

MORRIS E. LASKER
United States District Judge

APPENDIX D

Memorandum of District Court, dated March 6, 1974.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 778

MEMORANDUM

UNITED STATES ex rel. LOIS SEBO, VANESSA CARNEY, RITA VARNER, EDNA GRIFFIN, DAISY JOHNSON, LINDA FELONG, DIANE PIACENTINE, SUSAN PASNICK, JUDY SPRATLING, and all persons similarly situated,

Petitioners,

against

PETER PREISER, Commissioner of the New York Department of Correctional Services; FRANCES CLEMENT, Warden of Bedford Hills Correctional Facility, Bedford Hills, New York; ROBERT HENDERSON, Superintendent of the Auburn Correctional Facility, Auburn, New York; VITO TURNELLO, Superintendent of the Elmira Correctional Facility, Elmira, New York, and all other persons similarly situated; PAUL J. REGAN, Chairman of the New York Parole Board; and MALCOLM WILSON, Governor of the State of New York,

Respondents.

APPEARANCES:

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Appendix D.

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LASKER, D.J.

The issues before us in this latest of a number of opinions filed in this storied case are whether plaintiffs' allegations that the New York procedure for imposing "extended" reformatory sentences upon them is unconstitutional and that they are constitutionally entitled to time off for good behavior state claims upon which relief can be granted. We wrote earlier on these subjects, when plaintiffs sought injunctive relief, and the issue before us was whether these propositions presented substantial constitutional questions such as to require the convening of a three judge court. We held that they did. 351 F. Supp. 522 (1972) and 355 F. Supp. 231 (1973). Since that time plaintiffs have withdrawn their request for injunctive relief, and we are now asked to rule as a single judge on defendants' motion to dismiss the two claims described above.

I.

Plaintiffs have been convicted of misdemeanors which carry a sentence of a year or less in the case of an adult. However, under the provisions of §§ 75.00 and 75.01 of the

New York Penal Law, they have been sentenced to indefinite reformatory terms of up to four years. The statutory provisions for such an "extended sentence" contain no standards as to when they should be applied, although they have been construed by the courts of New York to be applicable only when the defendant is "reformable" (*see People ex rel. Meltsner* v. *Follette,* 32 App. Div. 2d 389, 302 N.Y.S. 2d 624 (2d Dept. 1969); *cf. People* v. *Bell,* 38 App. Div. 2d 778, 328 N.Y.S. 2d 153 (4th Dept. 1972)). Plaintiffs contend that they have been deprived of due process, since they were not accorded dispositional hearings to determine whether they were indeed reformable. They further argue that they are entitled to such a hearing under the equal protection analysis of *Humphrey* v. *Cady,* 405 U.S. 504 (1972), applied in *Davy* v. *Sullivan,* 354 F. Supp. 1320 (M.D. Ala. 1973) (three judge court).

Defendants deny the applicability of *Humphrey* and *Davy* (or *Specht* v. *Patterson,* 386 U.S. 605 (1967), a forerunner of *Humphrey*). As to *Specht,* they argue that the Court ruled that a separate hearing is required only when a conviction of crime triggers the need for new findings as to whether a defendant is in fact a sexual deviate. As to *Humphrey,* defendants contend that its holding is limited to the proposition that new findings by a jury outside the traditional sentencing process may be required on equal protection grounds where—but only where—similar findings are required by state law for civil commitments.

We agree with defendants that the *Humphrey-Specht* axis of decision does not point to the constitutional requirement of a "dispositional hearing" for imposition of an extended sentence in the case of a young offender. We accept defendants' rationale that it is not the correlation between the actual length of sentence and the maximum possible sentence for the crime that is critical as to whether a dispositional hearing is required, but rather the nature of the determination to be made in imposing sentence. As

we read *Humphrey-Specht*, a dispositional hearing may be constitutionally required as a matter of due process (*Specht*) or equal protection (*Humphrey*) where it is necessary to make a separate decision of fact outside the traditional sentencing process—*e.g.*, as in those cases, whether the defendant is in fact a sexual deviate, but not, as here, to determine whether a defendant shows rehabilitative potential—a matter which falls within the parameters of traditional sentencing.

Nevertheless, for reasons which we will elaborate, we conclude that the contention that the New York statutory framework for imposing on youthful offenders reformatory sentences which may be substantially longer than the sentence which may be imposed on adults for the same offense is unconstitutional, as that framework has been construed by the New York courts, states a claim upon which relief can be granted.

II.

Defendants argue that the New York statutory scheme is "identical" to the Federal Youth Correction Act (18 U.S.C. § 5010 *ff*) and we have earlier held that the two acts are sufficiently similar so that federal decisions construing the latter may appropriately be applied in determining the constitutionality of the former (351 F. Supp. at 526-27).

The constitutional underpinning for the imposition of a longer sentence on a youthful offender than an adult for the same crime has been stated in plain words by Chief Justice (then Judge) Burger in *Carter* v. *United States*, 306 F.2d 283, 285 (D.C. Cir. 1962), as follows:

> "[C]ommitment under the Youth Correction Act may be longer than one year in cases of misdemeanors, essentially because such confinement cannot be equated

> with incarceration in an ordinary prison. . . . But the basic theory of that Act is rehabilitative and in a sense this rehabilitation may be regarded as comprising the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison. The reasoning of the Cunningham court is relevant in this connection. The court there noted that the Youth Corrections Act 'provides for and affords youthful offenders, in the discretion of the judge, not heavier penalties and punishment than are imposed upon adult offenders, but the opportunity to escape from the physical and psychological shocks and traumas attendant upon serving an ordinary penal sentence while obtaining the benefits of corrective treatment, looking to rehabilitation and social redemption and restoration'. 256 F.2d at 472."

The clear instruction of the *Carter* holding, which is typical of a plethora of federal decisions upholding the constitutionality of the federal act,[1] is that absent the *quid pro quo* of rehabilitation an extended sentence is not constitutionally justified.

We must, therefore, examine the New York statutory framework, as construed by the New York courts, to determine whether, as its provisions operate, defendants who are sentenced to extended reformatory sentence under its provisions are assured of the opportunity of rehabilitation. We conclude that they are not.

To be sure the New York scheme includes many virtues. For example, the New York Criminal Procedure Law (CPL)[2] sets out a detailed, normal, modern pre-sentence and sentence procedure. Before a reformatory sentence can be imposed, it requires a pre-sentence investigation of "the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality,

and the defendant's social history, employment history, family situation, economic status, education, and personal habits," as well as "any other matter which the agency conducting the investigation deems relevant to the question of sentence." (CPL § 390.30 (1).) Furthermore, the pre-sentence report, presented to the sentencing judge, must contain not only an analysis of as much of the investigated material as the agency deems relevant to sentence (CPL § 390.30 (3)), but also "must include any matter the court directs to be included" (CPL § 390.30 (1)). Even if the worst is assumed, that is, that a hard-pressed judge faced with a heavy calendar of sentences may not often ask, or know enough about the information available to ask, that facts not considered relevant by the agency be included, the statutory requirements for investigation and report provide a framework which assures that the sentencing judge will have adequate information upon which to determine whether a reformatory sentence is appropriate.

This conclusion is strengthened by the fact that the CPL, as distinct from federal law, provides a statutory right to the defendant to file his own pre-sentence memorandum "setting forth any information he may deem pertinent to the question of sentence," together with written statements by others in support of facts alleged in the memorandum. (CPL § 390.40.)

Furthermore, in the case of a person convicted when less than 21 years old (and all of the plaintiff class are below that age), the court may order that the defendant "undergo a thorough physical or mental examination in a designated facility and may further order that the defendant remain in such facility for such purpose for a period not exceeding thirty days." (CPL § 390.30 (2).)

The present statute also authorizes the court, in its discretion, to hold a pre-sentence conference to "resolve any discrepancies between the pre-sentence report, or other

information the court has received, and the defendant's pre-sentence memorandum" or to "assist the court in its consideration of any matter relevant to the sentence to be pronounced." (CPL § 400.10 (1).) At such a conference, the court may direct the attendance of any person (CPL § 400.10 (2)) and may conduct "a summary hearing . . . on any matter relevant to sentence and may take testimony under oath" (CPL § 400.10 (3)). It is true that the last mentioned provisions do not apply to persons (including the named plaintiffs and others in the class) who were sentenced before the CPL became effective, September 1, 1971. Nevertheless, while we do not agree with defendants' suggestion that we should assume that such procedures were used prior to passage of the CPL merely because "nothing in the prior practice prohibited them," neither do we find that absence of such desirable provisions from the earlier law is fatal to the constitutionality of extended sentences imposed under it.

It is also true that the New York courts have held, as to §§ 2185 and 2195 of the old Penal Law, the predecessors of §§ 75.00 and 75.01 under which plaintiffs have been sentenced, that no extended sentence may be imposed except upon a showing that the defendant has the "ability to benefit from . . . rehabilitation facilities and treatment" (*People ex rel. Meltsner* v. *Follette, supra,* 32 App. Div. 2d at 390, 302 N.Y.S. 2d at 626).

Nevertheless New York's scheme is fatally flawed by the holdings and implications of other authoritative decisions determining the conditions under which extended sentences may be imposed. We have indicated above that the sole constitutional justification for imposing a longer sentence on a youthful offender than an adult for the same crime is the assurance of the *"quid pro quo"* of rehabilitative treatment; but the Court of Appeals of New York, as we read its holdings on the subject, has quite clearly

stated that no such *quid pro quo* is required by New York law. In *People* v. *Wilson*, 17 N.Y.2d 40, 268 N.Y.S. 2d 6 (1965), the court specifically approved extended sentences under Article 7-A of the Correction Law (allowing commitment to local or city reformatories), although candidly acknowledging that "[a]s we wrote in *People ex rel. Kern* v. *Silberglitt*, we know 'that this kind of sentence, authorized by the legislature for one purpose [i.e. rehabilitation], is being used for quite a different one'" (*id.* at 43, 268 N.Y.S. 2d at 8) and that "there is nothing illegal about any of these sentences, however ill advised some or all might seem to be, and even though article 7-A sentences may have been imposed not for reformation purposes but to keep the defendants in custody for a longer time" (*id.* at 45, 268 N.Y.S. 2d at 10).

Silberglitt and *Wilson* are perfectly clear in holding that the imposition of an extended sentence on young persons is permissible even if imposed for punishment rather than rehabilitation. Such a rationale flies in the face of the constitutional justification for extended sentences articulated by Chief Justice Burger in *Carter* v. *United States*, *supra*, and removes the underpinning on which the constitutional edifice of the scheme is founded. Accordingly, we find that plaintiffs' allegation that the New York scheme deprives them of due process states a claim upon which relief can be granted and defendants' motion to dismiss this cause of action is denied.

III.

Although in the present posture of the case we are not called upon to suggest a procedure which would render the New York statutory framework constitutional, we believe it would be constructive to do so.

Appendix B.

Since the fundamental requirement is to prohibit the use of an extended sentence for punishment rather than rehabilitation, this indispensible factor can best be ensured by following the procedure recently imposed on federal trial courts in this circuit by the decision of the Court of Appeals *en banc* in *United States v. Kaplan*, No. 73-1593 (February 11, 1974). In *Kaplan* the court ruled that in sentencing a defendant eligible for treatment under the Federal Youth Corrections Act, the trial court must make explicit findings whether the defendant will benefit from such treatment and must provide a statement of reasons underlying its ultimate finding.[1]

It is true that *Kaplan* is founded on a construction of the Federal Youth Corrections Act rather than the Constitution, but there are a number of reasons for applying its rule to proceedings under the New York statute as well. First, as we stated earlier, New York's Attorney General, representing the defendants, declares that the New York and federal schemes are "identical" and we accept his statement as an authoritative view of how the New York statute should be compared to the federal. Second, the purposes of both statutes are clearly the same. Even though the New York law does not indicate in *haec verba*, as the federal statute as construed does, a *preference* for treatment as opposed to an ordinary sentence, the mutual aims of both laws are a) to provide optional methods for the sentencing court and b) to ensure the use of those options in such a way that the defendant will receive the most appropriate disposition for his own benefit and that of society.

It follows that the sentencing court under either statute must make an intelligent and deliberate decision as to which sentencing course to pursue. The making of such a decision under the New York statute—just as much as under the Federal law—requires specific findings and a

statement of reasons for those findings. Such specificity will guard effectively against the possibility that an extended sentence may be imposed for punishment rather than rehabilitation. As the *Kaytor* court noted, the sentencing judge "should explain not only his very conclusion that the Act is applicable to the case; he should indicate that he has been informed of the pertinent facts relating to the individual defendant, either by any of the forms of the trial, a pre-sentence report or otherwise; and he should indicate that he has given consideration and related the facts of the individual case to the applicable law. * * * [T]he test is ultimately to be based upon an examination of the individual's case rather than a 'fixed sentencing policy based on the category of crime,' for example, or some other uniform or mechanical sentencing policy." *Kaytor*, slip op. at 9[11-18].

Such a procedure will not only ensure that Five Year's Act is administered in accordance with its purpose, and avoid constitutional questions, but also that the court to which a reformatory sentence may be appealed has available to it the information necessary to determine the appropriateness of the sentence. As the *Kaytor* court noted: "There is no rational way in which [a reviewing court] can determine whether such a finding is adequately supported in the absence of a statement of the reasons underlying it as an ultimate finding." Slip op. at 9[18].

The proposition could not be better put than in the words of the 1959 Report on Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences at 2.0 (Approved Draft 1968), which the *Kaytor* court quoted with approval (slip op. at 9[17]):

> "It is hardly commanding of public respect for our system of law that we have to surround the alternatives of the sentencing judge as that he may change the

> sentence to fit each case, and on the other hand to take the position that he need not explain why he selects a particular sentence."

Without applying the requirements of *Kaylor*, there is serious risk that, in spite of the merit of the New York statutory framework, injustice may be done to the young person whom it is intended to assist. As has been noted elsewhere,

> "The difficulty with the rehabilitative ideal is that it assumes an 'internal pernicious force' in the individual as the genesis of the criminal act, and ignores equally, perhaps more, important environmental forces. Not all offenders are sick; many are exceedingly normal given the conditions of their existence. These basic insights, however, are lost in the juvenile sentencing schemes that authorize wholesale confinement of youthful offenders, and allow courts to practice confinement as much on the basis of the community's desire for protection as the individual's need for treatment. This ambiguity in the conduct classification, coupled with the inevitable unevenness of judicial performance in assessing need for treatment, means that many children who are not within the intended class can be committed for an indeterminate period simply because they engage in certain conduct." E. Chase, "Schemes & Visions: A Suggested Revision of Juvenile Sentencing," 51 Tex. L. Rev. 673, 687-88 (1973) (footnote omitted).

Such a result would not carry out the intentions of the legislature nor meet constitutional standards.

It is well to recall the Supreme Court's observations in *In Re Gault*, 387 U.S. 1, 18-20 (1967):

> "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated,

is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: 'The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts. . . .' The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness. The Chairman of the Pennsylvania Council of Juvenile Court Judges has recently observed: 'Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process.'

Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." (Footnotes omitted.)

Courts ought not shut their eyes to the fact that "[a] recent stream of commentary has recognized that the indeterminate sentence, with its uncertainty and potential for discrimination, is more burdensome, ironically, than the definite sentence it is designed to replace." 51 Tex. L. Rev. at 705. To guard against the irony of the indeterminate sentence—intended to be beneficent—becoming more burdensome than the sentence it was intended to supplant, the Constitution requires procedures which will prevent the imposition of an extended sentence for the purpose of punishment rather than rehabilitation.

Appendix D.

IV.

Sections 803 and 804 of the New York Correction Law authorize conditional release for persons sentenced both to indeterminate and definite terms. Under the statutory provisions, the plaintiff class—that is, those subject to reformatory sentences—are not eligible for the benefit of good behavior allowance and consequent conditional discharge. Plaintiffs allege that §§ 803 and 804 are unconstitutional on their face and as applied under the due process and equal protection clauses, "because they deny persons sentenced thereunder the opportunity to earn good time and to be released on conditional release, without any valid penological or other consideration, even though such persons are treated the same and punished to the same extent as other prison inmates who are granted good time and the opportunity to be released on conditional release. They deny persons aged 16 to 21 equal protection of the law, by treating such persons worse than they treat persons over 21 who commit the same or lesser offenses, for no compelling or even rational basis." (Amended Petition of November 9, 1973, at par. 12(g).)

Defendants argue that denial of good time in the case of a reformatory sentence is penologically and constitutionally justified, since the purpose of a reformatory sentence is to create a flexible program designed for rehabilitation, not punishment, and that the appropriateness of release in such a case is to be determined by successful rehabilitation (parole) rather than willingness to participate in a program (good behavior allowance).

In dealing with this subject, on the original motion to convene a three judge court, we wrote:

> "Without deciding, now, whether the legislative scheme rests on constitutionally acceptable premises,

> it is at least clear that, if in practice it confines youthful inmates longer than adults without actually offering them a program of rehabilitation, its operation would raise a serious constitutional question." 351 F. Supp. at 531.

We are presently required to rule whether plaintiffs' attack on the state practice judged in the light of the allegations of the complaint—which must be taken as true on a motion to dismiss—states a claim upon which relief can be granted. We hold that it does.

Even if we accept, *arguendo*, defendants' contention that denial of good time to those under reformatory sentences is justified by the reasonableness of requiring success in a rehabilitation program, the theory fails because the very heart of plaintiffs' claim is that they are being furnished no rehabilitative program. For example, plaintiffs allege that "There are numerous young people, who were sentenced under Penal Law § 75.10, in all adult prisons throughout New York State, and they are treated no differently from other inmates at such institutions, but are completely comingled with them, and receive no special treatment despite these special sanctions imposed upon them." (Amended Petition of November 9, 1973, at par. 8.)

If these allegations are established at trial, the props would be knocked from under defendants' constitutional justification. Indeed, the situation would then be identical with that in *Bolling* v. *Manson*, 345 F. Supp. 48 (D. Conn. 1972) (three judge court), in which our sister court (per opinion of Smith, Circuit Judge) ruled that a comparable Connecticut statutory plan violated the equal protection clause. There, the court held that depriving juveniles and women sentenced to indefinite terms of good time credit was impermissible, because "[s]ince . . . the state has

made no distinction in conditions of confinement based on the nature of an inmate's sentence, there is no basis in fact, much less a compelling state interest grounded in different treatment methods, behind the challenged discrepancy in good time" *Id.* at 51.

Defendants' attempted distinction between *Bolling* and the case at hand, on the ground that in the former the state conceded that all classes of prisoners in Connecticut were treated identically, is unacceptable on a motion to dismiss, since the allegation that in New York there is also an identity of treatment between adults and the plaintiff class must be accepted as true. Nor is the *Bolling* decision to be disregarded because it adopted the "compelling necessity test" which has since been ruled inapplicable by the Supreme Court in "good time" cases (*McGinnis* v. *Royster*, 410 U.S. 263, 270 (1973)), because *Bolling* held that—questions of compelling necessity aside—"there is no basis *in fact* . . . behind the challenged discrepancy in good time." 345 F. Supp. at 51 (emphasis added).

We need not determine at this time whether, as ruled by a New York State judge (*People ex rel. Cromwell* v. *Warden*, Index No. 442/1973 (Supreme Court Bronx Co., June 13, 1973)), New York's denial of good time may violate the equal protection clause even if a rehabilitation program is available to plaintiff class when, nevertheless, the plaintiff class is treated identically with other prisoners.

The Supreme Court's decision in *McGinnis* v. *Royster*, *supra*, does not dictate a different conclusion. The issue there was different, involving only the denial of good behavior time against the minimum sentence for time served in jail before conviction. The Court ruled that such a denial, was rationally founded, and therefore constitutionally justified "on the ground that the risk of prematurely releasing unrehabilitated or dangerous criminals may well be greatest when the parole decision is made prior to expira-

tion of the minimum sentence." 410 U.S. at 274. That is a far cry from holding that, where the constitutional support for denial of good time is claimed to be the need for successful completion of a rehabilitation program, the denial is permissible where no such program in fact exists.

V.

There remain for trial the critical questions whether New York in fact provides a program of rehabilitation for the plaintiff class and whether the constitutional premise that a young person is more amenable to rehabilitation than an adult is factually valid.

The motions to dismiss are denied. The parties are instructed to prepare a schedule of discovery so that a trial date may be set.

It is so ordered.

Dated: New York, New York
March 6th, 1974.

MORRIS E. LASKER
U.S.D.J.

Appendix D.

Footnotes

[1] *See, e.g., Caldwell* v. *United States*, 435 F.2d 1079 (10th Cir. 1970); *Abernathy* v. *United States*, 418 F.2d 288 (5th Cir. 1969); *United States* v. *Rehfield*, 416 F.2d 273 (9th Cir. 1969), *cert. denied*, 397 U.S. 996, 90 S.Ct. 1137, 25 L.Ed.2d 405, *reh. denied*, 397 U.S. 1081, 90 S.Ct. 1526, 25 L.Ed.2d 820 (1970); *United States* v. *Dancis*, 406 F.2d 729 (2d Cir.), *cert. denied*, 394 U.S. 1019, 89 S.Ct. 1640, 23 L.Ed. 2d 44 (1969); *Johnson* v. *United States*, 374 F.2d 966 (4th Cir. 1967); *Brisco* v. *United States*, 368 F.2d 214 (3d Cir. 1966); *Kotz* v. *United States*, 353 F.2d 312 (8th Cir. 1965); *Rogers* v. *United States*, 326 F.2d 56 (10th Cir. 1963); *Standley* v. *United States*, 318 F.2d 700 (9th Cir. 1963); *Tatum* v. *United States*, 114 U.S. App.D.C. 49, 310 F.2d 854 (1962); *Carter* v. *United States*, 113 U.S. App.D.C. 123, 306 F.2d 283 (1962); *Cunningham* v. *United States*, 256 F.2d 467 (5th Cir. 1958).

[2] The CPL became effective September 1, 1971. The named plaintiffs—and presumably other members of the plaintiff class—were sentenced when its predecessor, the Code of Criminal Procedure, was in effect. The Practice Commentary to CPL § 390.30 (relating to pre-sentence reports) states that "this section is substantially a restatement of former Code [of Criminal Procedure] Section 931 (Subd. 1)," and we agree that it is.

[3] The *Kaylor* determination is contrary to rulings of New York courts on the subject. While the New York courts have ruled that an extended sentence may not be imposed in the absence of a showing of "the ability [of the defendant] to benefit from . . . rehabilitation facilities and treatment" (*People ex rel. Meltzner* v. *Follette*, *supra*, 32 App. Div. 2d at 390; 302 N.Y.S.2d at 626), nevertheless the Court of Appeals of New York has "decided that the fact that there was *no evidence* of an affirmative finding that defendant was incapable of reformation did not invalidate the original sentence since there was no requirement that the sentencing court make an express finding on reformability before imposing sentence, and the imposition of the sentence itself under the circumstances implied a finding." *People* v. *Silberglitt*, 4 N.Y.2d 59, 65, 172 N.Y.S.2d 145, 150 (1958) (emphasis in original). *See also People* v. *Ball*, 38 App. Div. 2d 778, 328 N.Y.S.2d 153 (4th Dept. 1972).

APPENDIX E

Memorandum of the District Court, dated January 23, 1974.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

UNITED STATES ex rel. LOIS SERO, VENESSA CARNEY, RITA VARNER, EDNA GRIFFIN, DAISY JOHNSON, LINDA FELONG, DIANE PIACENTINE, SUSAN PASNICK, JUDY SPRATLING, and all persons similarly situated,

Petitioners,

against

PETER PREISER, Commissioner of the New York Department of Correctional Services; FRANCES CLEMENT, Warden of Bedford Hills Correctional Facility, Bedford Hills, New York; ROBERT HENDERSON, Superintendent of the Auburn Correctional Facility, Auburn, New York; VITO TURNELLO, Superintendent of the Elmira Correctional Facility, Elmira, New York, and all other persons similarly situated; PAUL J. REGAN, Chairman of the New York Parole Board; and MALCOLM WILSON, Governor of the State of New York,

Respondents.

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Appendix E.

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LASKER, D.J.

The checkered career of this litigation has produced what in other circumstances Judge Friendly has aptly called a "Brobdingnagian procedural imbroglio." This suit was brought originally both as a habeas corpus action and as a civil rights action under 42 U.S.C. § 1983, attacking the conditions of confinement of the plaintiffs and seeking to declare unconstitutional the statutes under which they were sentenced. A motion was filed for the convening of a three judge court and the declartion of a class action. Both motions were granted. 351 F. Supp. 522 (1972). While the matter was *sub judice* before the three judge court, the Supreme Court rendered its decision in *Preiser* v. *Rodri-*

guez, 411 U.S. 475 (1973), which held that if a prisoner challenges the fact or duration of his confinement, his exclusive remedy in federal court is by way of habeas corpus under 28 U.S.C. § 2241 *ff*, and that he may not sue under 42 U.S.C. § 1983. Believing at the time that *Preiser* prevented them from continuing their suit under § 1983, plaintiffs moved to amend their complaint to delete their prayer for declaratory and injunctive relief. The motion was granted by the three judge court. The deletion of the prayer for such relief undid the basis for the existence of a three judge court and the case was remanded to the convening judge.

Plaintiffs now move to amend their complaint to restore the § 1983 claim, with a prayer for declaratory but not injunctive relief. Certain other prisoners also move to intervene in the action.

The State opposes the motion to amend the complaint on the grounds that under *Preiser* the plaintiffs cannot institute a § 1983 action. While the argument would be valid if the plaintiffs sought only to challenge the fact or duration of their confinement, it does not apply here because the amended complaint (and indeed the original complaint) clearly attacks not only the fact and duration but the very conditions of confinement. For example, the complaint specifies that at various institutions at which plaintiffs and the members of their class are incarcerated, they "have received no significant vocational, or other educational or moral guidance, but instead have been subjected to a debasing and criminalizing environment. Inmates . . . are assigned to menial work details that do not teach any marketable skills. During work details and the other times, petitioners and other young persons who may have been guilty of nothing more than Class B or Class A misdemeanors, are continually exposed to murderers, robbers, thieves, prostitutes, drug addicts and lesbians." (Complaint, par. 5 *e.g.*)

In such circumstances, the right of a prisoner to bring an action under 42 U.S.C. § 1983 is not foreclosed by *Preiser* which specifically states at 499, n. 14:

> "If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from *simultaneously* litigating in federal court, under § 1983, his claim relating to the conditions of his confinement." (Emphasis added.)

Accordingly, there is no doubt that plaintiffs are free to press their § 1983 claims. Bearing in mind both the admonition of Rule 15 of the Federal Rules of Civil Procedure that amendments are to be allowed liberally and considerations of judicial economy, the amendment should be allowed and the motion is therefore granted.

The motion to intervene is denied. It appears to us unnecessary to enlarge the group of named plaintiffs since the matter has already been declared a class action.[2] The class has been defined as follows:

> "The class challenging Sections 75.00 and 75.10, subd. 1 of the Penal Law will consist of all misdemeanants serving reformatory sentences, while the class challenging Sections 803 and 804 of the Correction Law will include all reformatory sentenced inmates, felons and misdemeanants alike." 351 F. Supp. at 522.

There is no doubt that a class action may be appropriate for habeas corpus purposes as well as for § 1983. *Williams v. Richardson*, 481 F.2d 256 (8th Cir. 1973); *Mead v. Parker*, 464 F.2d 1108 (9th Cir. 1972); *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971) (three judge court,

opinion of Kaufman, now Chief Judge), *aff'd*, 406 U.S. 913 (1972); *Developments in the Law-Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1170 (1970). The fact that conditions may vary at the different institutions named in the complaint, does not render the class action device inappropriate in this case. If the variance of conditions is significant, subclasses may be established.

We cannot agree with the argument defendants expressed in their brief before the three judge court that the original plaintiffs cannot represent members of the class at institutions other than that at which they are themselves confined. It is, of course, true that separate proof will be required as to conditions existing at each of the institutions affected by the suit. However, the general question of whether rehabilitative programs are available applies to all members of the class. Subclasses can, as we have indicated above, be created where there is a distinct variance among conditions at the institutions. In no event do we see the necessity of proof being required as to the program offered to each separate member of the general class. We thus cannot accept the defendants' view that the case must be limited to conditions at the institutions at which the named plaintiffs are confined; and if we did accept that view, we would feel impelled to grant the motion to intervene in the interests of justice.

The motion to amend the complaint is granted. The motion for intervention is denied. A new amended complaint shall be filed eliminating references to the proposed intervenors.

It is so ordered.

Dated: New York, New York, January 25rd, 1974.

Marvin E. Lasser
U.S.D.J.

Appendix E.

Footnotes

[1] *Cross Co. v. American Standard*, Inc., 70 Ohio St2d (Dec. 6), (1975), at 602.

[2] *Ohio Savings Ins. Assn. v. Mortgage Investors*, 71 Ohio St2d (Jan. 10), (1975), at 1.

[illegible]

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[illegible]

[illegible]

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Appendix F.

LASKER, D.J.

On October 25, 1972, we denied plaintiffs' motion to convene a three-judge court to consider the constitutionality on their face of Sections 75.00 and 75.10.1 of the New York Penal Law (McKinney 1967), because we felt prior decisions of higher courts foreclosed granting the requested relief. Plaintiffs move for reconsideration of this decision[1] in light of *Goosby* v. *Osser*, 41 U.S.L.W. 4167 (U.S., Jan. 17, 1973).

In *Goosby*, the Supreme Court clarified the meaning of the substantiality prerequisite to the convening of a three-judge court:

> "Section 28 U.S.C. § 2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962), 'wholly insubstantial,' *ibid*, 'obviously frivolous,' *Hannis Distilling Co.* v. *Baltimore*, 216 U.S. 285, 288 (1910), 'obviously without merit,' *Ex parte Poresky*, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281." 41 U.S.L.W. at 4169.

In light of the *Goosbly* language and holding,[2] there is no doubt, as a brief analysis will show, that reconsideration of our prior decision is necessary, and that the issues

previously held to be foreclosed should be submitted to the three-judge court convened pursuant to the earlier decision to consider plaintiffs' challenge to New York Correction Law Sections 803 and 804.

Our opinion found the substantive attack on the statute to be foreclosed because of the many cases, including one from this Circuit,[3] upholding the constitutionality of the Federal Youth Corrections Act (18 U.S.C. § 5005 *et seq.*), which permits a judge to sentence a youth offender[4] to an indeterminate term with conditional release after four years and unconditional release after six years (*id.* at §§ 5010(b), 5017(c)), even though adult offenders are subject to a shorter maximum sentence. The aim of both the New York and the federal statutes is the same: rehabilitation of offenders during their formative years through a flexible but, if necessary, lengthy term of incarceration. *Compare Carter* v. *United States,* 306 F. 2d 283, 285 (D.C. Cir. 1962) *with People ex rel. Meltsner* v. *Follette,* 32 App. Div. 2d 389, 390-91, 302 N.Y.S. 2d 624, 626-27 (2d Dept. 1969). The cases leave no doubt that the use of lengthier sentences for young persons does not *per se* violate the Constitution.[5]

Nevertheless, we do not think "prior decisions *inescapably* render the claims *frivolous.*" *Goosby,* 41 U.S.L.W. at 4169 (emphasis added). No decision of a higher federal court has upheld the particular provisions challenged here. Moreover, the analogous federal statute differs from New York's provisions in one respect which in the light of *Goosby* may be considered material.

The Federal Youth Corrections Act provides:

> "Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide

> the essential varieties of treatment. . . . Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment." 18 U.S.C. § 5011.

The New York statute contains no such provision and has been interpreted not to require confinement of young adults in institutions separate from adult convicts. *Metsner, supra.* Moreover, plaintiffs claim, and defendants do not deny, that reformatory-sentenced inmates are in practice intermingled with adult offenders and non-reformatory sentenced young adult offenders. The complaint further alleges that reformatory-sentenced inmates are treated identically with other inmates and receive no treatment which can realistically be expected to promote their rehabilitation.

We do not now decide, or imply, that segregation or different treatment of reformatory sentenced inmates is constitutionally mandated.[6] However, there is no question that meaningful efforts at rehabilitation *are* required to justify imposition of a longer sentence for young adults than adults; "the basic theory . . . is rehabilitative and in a sense this rehabilitation may be regarded as the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison." *Carter* v. *United States,* 306 F. 2d 283, 285 (D.C. Cir. 1962). The federal statute *on its face* requires treatment; the New York statute does not. This fact alone differentiates them and, following *Goosby,* requires submission of the latter to the three-judge court, despite cases upholding the former.

We turn to the question whether imposition of reformatory sentences without a prior hearing on "reformability"

denies sentenced persons due process of law. Counsel's able brief supporting an affirmative answer convincingly demonstrates that this issue, also, raises a substantial constitutional question under the applicable standard clarified in *Goosby,* and may do so even under the more rigorous approach followed in our earlier decision.

Although we recognized, at that time, the existence of some authority for plaintiffs' contention that a pre-sentence hearing is required by due process,[7] we felt constrained to hold that cases emphasizing the broad discretion accorded sentencing judges foreclosed the issue. *See, e.g., McGautha* v. *California,* 402 U.S. 183 (1971);[8] *Smith* v. *Follette,* 445 F. 2d 955 (2d Cir. 1971); *United States* v. *Rosenberg,* 195 F. 2d 583 (2d Cir.), *cert. denied,* 344 U.S. 838 (1952). We are now persuaded that the distinction between imposing sentence solely as a penalty and sentencing as a penalty coupled with an implicit finding of reformability is such that earlier holdings do not foreclose plaintiffs' constitutional challenge. As sugggested by the *Preliminary Report of the* [*New York State*] *Governor's Special Committee on Criminal Offenders* (June 1968), if incarceration represents a penalty only, then, "[t]he authorized sanction for criminal conduct should be based upon the gravity of the conduct, and not upon the condition of the offender" and should carry the same maximum for all, regardless of age. *Id.* at 147.

Furthermore, *Humphrey* v. *Cady,* 405 U.S. 504 (1972), relied on by plaintiffs to support their due process argument, also raises a serious question whether the reformatory sentencing procedure violates the equal protection clause. In *Humphrey,* petitioner was committed to a sexual deviate facility for treatment in lieu of sentence following a criminal conviction. He was not afforded a jury determination prior to commitment, although such a procedure was provided persons committed under the

Mental Health Act. He claimed that denial of the procedural protection accorded the latter deprived him of equal protection. The Court found his claim substantial enough to require holding an evidentiary hearing on his petition for a writ of habeas corpus, even though Humphrey's commitment, unlike that of persons committed under the Mental Health Act, flowed from a criminal conviction. The Court said:

> "Respondent seeks to justify the discrimination on the ground that commitment under the Sex Crimes Act is triggered by a criminal conviction; that such commitment is merely an alternative to penal sentencing; and consequently that it does not require the same procedural safeguards afforded in a civil commitment proceeding. That argument arguably has force with respect to an initial commitment under the Sex Crimes Act, which is imposed in lieu of sentence, *and is limited in duration to the maximum permissible sentence.* The argument can carry little weight, however, with respect to the subsequent renewal proceedings, which result in five year commitment orders . . . *in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime.*" 405 U.S. at 510-11 (emphasis added).

There are significant parallels between the situation in *Humphrey* and the case at hand. As noted by the *Preliminary Report of the Governor's Special Committee on Criminal Offenders:*

> "Under the present setup the misdemeanant between the ages of sixteen and twenty-one is not even entitled to the legal protection accorded juvenile delinquents and PINS; *i.e.,* a dispositional hearing in which the question of whether he requires 'supervision, treatment, or confinement' can be litigated. The reason he is not

accorded such protection is that the sentence is a criminal sanction, rather than a civil commitment. And, as such, it should be proportioned to the conduct." *Id.* at 147.

In light of *Humphrey*, the sentencing procedure involved here raises substantial equal protection problems, which were not previously considered by this court. They warrant submitting this aspect of the case to the already convened three-judge court.

Accordingly, the motion for reconsideration is granted and our prior decision and order are modified to provide that plaintiffs' challenge to New York Penal Law, Sections 75.00 and 75.10.1, as unconstitutional on their face as violating substantive and procedural due process and the equal protection clause will be submitted to the three-judge court previously convened to consider New York Correction Law, Sections 803 and 804.

It is so ordered.

Dated: New York, New York February 27th, 1973.

MORRIS E. LASKER
U.S.D.J.

Appendix F.

FOOTNOTES

[1] The decision, reported at 351 F. Supp. 522, was implemented by two orders dated November 8, 1972.

[2] In *Goosby* the Court held that a substantial constitutional question was presented by plaintiffs' attack on a statute which expressly prohibited persons confined in penal institutions from voting by absentee ballot, despite its earlier decision that denying pre-trial detainees absentee ballots because they were not included among persons specifically permitted to vote by absentee ballot was unconstitutional.

[3] *United States* v. *Dancis*, 406 F. 2d 729 (2d Cir.), *cert. denied*, 394 U.S. 1019 (1969).

[4] A youth offender is defined as "a person under the age of twenty-two years at the time of conviction." 18 U.S.C. § 5006(e).

[5] See cases cited *Sero*, 351 F. Supp. at 526, n.4.

[6] See *In re Brown*, No. 17,997 (3d Cir., July 10, 1970), 7 Cr. L. Rpt. 2378, which implies that different treatment of juveniles may be required to justify longer confinement. Slip. op. at 9, 7 Cr. L. Rpt. at 2378.

[7] Plaintiffs contended before, and argue again that *In re Brown, supra*, supports his position and requires a hearing before imposition of a reformatory sentence. We remain convinced that the case does not stand for that proposition. Although the court expressed distaste with sentences for juveniles greatly in excess of those given adults and required the District Court to justify imposition of a longer sentence by "explicit findings and conclusions" (Slip op. at 9, 7 Cr. L. Rept. at 2378), we do not understand this requirement necessarily to mandate a separate evidentiary hearing, but merely that the judge make known the facts in the record and the pre-sentence report upon which he is relying.

[8] There is some question as to the extent to which *McGautha* has been undercut by the Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972).

APPENDIX G

Memorandum of District Court, dated October 25, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

72 Civ. 778

LOIS SEBO, VANESSA CARNEY and RITA VARNER,

Plaintiffs,

against

RUSSELL G. OSWALD, Commissioner of New York State Correctional Services, FRANCES CLEMENT, Warden of Bedford Hills Correctional Facility, Bedford Hills, New York, and

NELSON A. ROCKEFELLER, Governor of the State of New York,

Defendants.

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Appendix G.

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Lasker, D.J.

Plaintiffs, Lois Sero, Vanessa Carney and Rita Varner, are inmates of Bedford Hills Correctional Facility. Defendants are the Commissioner of New York State Correctional Services, the warden of Bedford Hills and the Governor of the State. Although convicted of crimes which carry a maximum sentence for adults of one year or less, plaintiffs are serving reformatory terms of up to four years pursuant to Sections 75.00 and 75.10.1 of the New York Penal Law and are deprived of the good behavior allowances provided non-reformatory inmates by §§ 803 and 804 of the New York Correction Law. They allege that these provisions operate to deprive them of their right to equal protection of the law and due process and constitute cruel and unusual punishment. They seek the convening of a three-judge court pursuant to 28 U.S.C. § 2281ff, as well as declaratory, injunctive and miscellaneous relief.[1] Defendants cross-move to dismiss the complaint.[2] Jurisdiction

is predicated on 28 U.S.C. §§ 1343(3), (4), 2201 and 2281.

Criteria for convening a three-judge court.

The district court's role in determining whether a three-judge court should be convened pursuant to 28 U.S.C. § 2281 is limited to deciding whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. *Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962). These requirements, that the constitutional attack be against the state statute's general application and that a state officer be named as a defendant (*Ince* v. *Rockefeller,* 290 F. Supp. 878, 881 (S.D.N.Y. 1968)), are met here, and the complaint alleges a basis for equitable relief. The sole issue which remains as to each of these statutes is whether the complaint raises a substantial constitutional issue. Despite the interrelationship between the statutes, we consider them separately for the sake of clarity.

New York Penal Law §§ 75.00 and 75.10.1.

Section 75.00 of the Penal Law provides that, when sentencing a person aged 16 to 21 ("young adults"),

> the court may, in lieu of any other sentence of imprisonment authorized by this title, impose a reformatory sentence of imprisonment. This shall be a sentence to imprisonment for a period of unspecified duration which shall commence and terminate as provided in section 75.10 and the court shall not fix the minimum or maximum length of the period.

Section 75.10.1 provides that a reformatory sentence terminates upon discharge of the inmate by the board of parole or the expiration of four years from commencement of the term, whichever is earlier. The practice commentary

to Section 75.10.1 states that "the purpose of a reformatory sentence is to provide education, moral guidance and vocational training for young offenders who are badly in need of such instruction and counsel." *McKinney's Consolidated Laws of New York,* Penal Law, p. 156.

Plaintiffs claim that these provisions are unconstitutional on their face because 1) they violate the equal protection clause of the Fourteenth Amendment by discriminating against them (as compared to adults) without a rational or compelling basis; 2) they violate procedural due process because they do not provide for a separate hearing before the imposition of a reformatory sentence and because they establish no standards to guide the sentencing judge, thus permitting abuses of discretion and making appellate review impossible; and 3) they violate the cruel and unusual punishment clause of the Eighth Amendment and substantive due process by allowing the imposition of a sentence with a possible maximum of four years for minor offenses. Plaintiffs contend, further, that the provisions are unconstitutional as applied because the treatment which is the justification for reformatory sentences is not in fact given to the persons serving them.

Defendants oppose the convening of a three-judge court and cross-move to dismiss the complaint on several grounds. First, they claim that this action, which was brought pursuant to 42 U.S.C. § 1983, should have been brought as a habeas corpus action to be heard by a single judge after exhaustion of state remedies. Second, they argue that case law clearly upholds the constitutionality of the challenged provisions on their face and, accordingly, no substantial federal question is raised. Third, they contend that a three-judge court is not required to challenge the application of a statute which is constitutional on its face and that such a challenge cannot be brought as a class action. Finally, they maintain that the sentencing procedures do

not deny reformatory inmates due process since discretion and flexible procedures are accepted characteristics of the sentencing process.

Defendants' contention that a suit such as this should have been brought as a habeas corpus action on behalf of the individual named plaintiffs before a single judge (after exhaustion of state remedies) was disposed of in *Gesicki* v. *Oswald*, 336 F. Supp. 365 (S.D.N.Y. 1971) (convening opinion) and 336 F. Supp. 371 (S.D.N.Y. 1971) (three-judge court), *affirmed*, 406 U.S. 913 (1972). In *Gesicki*, plaintiffs challenged their confinement under the Wayward Minor Act in a suit brought pursuant to both the Civil Rights Act and the Habeas Corpus Act. The convening court found that exhaustion of remedies was not required since the state courts had recently and unambiguously upheld the constitutionality of the challenged statute. 336 F. Supp. a 367-68.

The case before us is in much the same posture as *Gesicki*. Lois Sero and Rita Varner, and another person not a named plaintiff, have actually exhausted their state remedies.[3] Since the City Court of Buffalo decided the issues before us adversely to Sero and Varner and the Erie County Court and the Court of Appeals denied them leave to appeal, "it would be a futility" (336 F. Supp. at 367) to require the other named plaintiffs to perform the empty formality of applying to the state courts for relief which they know will be refused them. *United States ex rel. Hughes* v. *McMann*, 405 F.2d 773, 775-76 (2d Cir. 1968).

Moreover, *Gesicki* shows that defendants' contentions that a suit such as this is not a proper class action and cannot be decided by a three-judge court are without merit. *Gesicki* clearly indicates that a habeas corpus action can be brought as a class action (336 F. Supp. at 373) and decided by a three-judge court (336 F. Supp. at 374, n.3), if the prerequisites of a class action are met and an injunction

against the enforcement of a state statute is sought. Indeed, the court in *Gesicki* held that the action could have been brought under either the Civil Rights Act (28 U.S.C. § 1343) or the Habeas Corpus Act (28 U.S.C. § 2254). 336 F. Supp. at 374, n.3. The *Gesicki* rule is applicable here, but in one material respect this case is even less clearly a habeas corpus action than *Gesicki*. In *Gesicki*, the statute under attack had been repealed prior to the commencement of the action, though it remained in effect as to persons previously sentenced under its provisions, including the plaintiffs. Accordingly, the effect of the statute, there, was limited to the expiration of the term of those already in custody, or on parole or probation pursuant to its provisions. Here, plaintiffs seek to enjoin the full prospective application of a statute which is currently in effect, not just for those in custody but for those who might be affected by its provisions hereafter. Thus, this suit is even more clearly a suit properly brought under § 1983 than was *Gesicki*.

We come to the merits. To determine the propriety of convening a three-judge court we must decide whether the decisions of the Supreme Court and other courts which are as analogous as possible to the case at hand "foreclose the subject." *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255 (1938). Applying this test, it is clear that the issue of whether the provisions of the statute before us are unconstitutional on their face is foreclosed. A veritable plethora of cases from almost every circuit has upheld a similar provision under the federal Youth Corrections Act, which permits a judge to sentence a youthful offender to an indeterminate term with a possible maximum of six years with automatic conditional release after four years (18 U.S.C. §§ 5010(b), 5017(c)), even though adult offenders cannot be sentenced to as long a term. Challenges to this statute based on the due process clause

of the Fifth Amendment and the cruel and unusual punishment clause of the Eighth Amendment by plaintiffs who would have received shorter sentences if sentenced as adults have consistently been rejected,[4] and the statute has been upheld by the Court of Appeals for this circuit. *United States* v. *Dancis*, 406 F.2d 729 (2d Cir.), *cert. denied*, 394 U.S. 1019 (1969).

The federal Youth Corrections Act is, of course, not open to challenge as a violation of the equal protection clause of the Fourteenth Amendment as are the New York Penal Law provisions. However, it would be anomalous to hold the states to a stiffer standard than the federal government in this regard.[5] See *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954); *Cunningham* v. *United States*, 256 F.2d 467, 473 (5th Cir. 1958). Moreover, the distinction between youthful offenders and adults embodied in all such statutes rests on a basis which is certainly rational,[6] namely, that, given special treatment, persons in their formative years are more amenable to rehabilitation than are adults.[7] Hence, on its face, the statute does not violate the equal protection clause and no substantial constitutional question is raised on that count.

We turn to the question of whether the claim that the statute as applied violates the equal protection clause raises a substantial constitutional question. Since plaintiffs allege, as they must to justify the convening of a three-judge court, that the statute is unconstitutional not merely as applied to them individually but as applied to all persons similarly situated, it is necessary before deciding the merits of this count to ascertain whether a class action determination is appropriate.

There is no doubt that this is a valid class action. The sole difficulty presented by such a determination is ascertaining the membership of the class. Article 75 of the Penal Law is challenged, here, as an unjustifiable imposi-

tion of a longer sentence on juveniles than the maximum which can be imposed on adults for the same crime. Since the contested four year maximum provided for by Article 75 is no greater than the permissible maximum term for all felonies (N.Y. Penal Law § 70.00(2)), it follows that only misdemeanants face longer imprisonment by virtue of the reformatory alternative. Accordingly, the class challenging the constitutionality of this statute consists solely of reformatory-sentenced misdemeanants.

Neither party has indicated an exact figure as to the number of members comprising this class and, indeed, such a figure might well be impossible to arrive at since the membership of the class is in a state of constant flux. However, some indication of the size of the class is given by the letter of R. Van Hoesen, Correctional Clerk of Coxsackie Correctional Facility, attached to the affidavit of Walter Dunbar, Executive Deputy Commissioner of the New York State Department of Correctional Services (in opposition to plaintiffs' motion), which states that as of April 28th, 1972, inmates serving reformatory sentences at Coxsackie numbered 227 youthful offenders (some of whom are certainly misdemeanants) and 103 misdemeanants. This is only one of a number of institutions throughout the state in which reformatory-sentenced inmates are confined. A class of this size is clearly sufficiently numerous that joinder of all members is impracticable. *Korn* v. *Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972).

The constitutionality of the provisions under which members of the proposed class were sentenced is a question of law common to all. Moreover, although all the named plaintiffs are female and all are confined at Bedford Hills Correctional Facility, there is no reason why they cannot represent the interests of male inmates or inmates at other institutions who are sentenced under §§ 75.00 and 75.10.1. Plaintiffs are represented by conscientious counsel who are experienced in this area of the law and, accordingly, we

believe that plaintiffs will adequately represent the interests of the members of the class. Finally, (Rule 23(b)(2)) the state has acted on grounds which are generally applicable to the class, making appropriate injunctive or declaratory relief with respect to the class as a whole.

Turning to the merits, we believe that, subject to the qualifications stated below, plaintiffs' contention that the statute as applied to the class which they represent violates the equal protection clause may present a substantial constitutional question requiring the convening of a three-judge court. Indisputably, the rational basis which sustains the discrimination between "young adults" and adults in the Penal Law is the same as that which underlies the federal statute, namely, the amenability of young offenders to rehabilitation through special treatment.[8] As the Court of Appeals for the District of Columbia has said, "the basic theory of that Act [the Youth Corrections Act] is rehabilitative and in a sense this rehabilitation may be regarded as the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison." *Carter* v. *United States*, 306 F.2d 283, 285 (D.C. Cir. 1962). Although it may not be constitutionally required that the state provide separate facilities for reformatory sentenced inmates, the very rationale for finding that the statute is constitutional on its face requires that its application afford those subject to it a meaningful program of rehabilitation.[9] Plaintiffs allege that they have received "no significant vocational, education or moral guidance but instead [have] been subjected to a debasing and criminalizing environment". *Complaint*, Par. 8(A)(1). On information and belief (without the benefit of discovery), they allege that the same facts are true of the other institutions in which reformatory sentenced inmates are confined. *Complaint*, Par. 8(D). Accordingly, their position is "that none of the possible justifications for a reformatory sen-

tence are in fact realized, but instead recidivism and criminality are increased." *Complaint,* Par. 9(g).

If plaintiffs' allegations can be substantiated, they would raise a substantial question as to the constitutionality of this statute.[10] Thus, it is apparent that the very existence of the prerequisite for the convening of a three-judge court turns almost entirely on facts which are not at our disposal. Accordingly, a hearing is necessary to determine whether plaintiffs can make at least a threshold showing that, on a statewide basis, persons in the plaintiff class are not afforded a program of rehabilitation.

Finally, we reach plaintiffs' contention that "[i]t is a denial of due process to impose such enhanced sentences without a separate hearing under articulated standards on both the need and avilability [sic] of such specialized treatment." *Memorandum in Support of Application for a Preliminary Injunction and Convocation of a Three-Judge Court,* at 8.

Plaintiffs' argument that the statute allows the sentencing judge excessive discretion is without merit. As the Court of Appeals for this court has stated in *Smith* v. *Follette,* 445 F.2d 955 (2d Cir. 1971):

> A sentencing judge . . . has always been afforded broad discretion in determining sentence and the existence of this discretion has not been thought to present constitutional difficulties. See *United States* v. *Rosenberg,* 195 F.2d 583, 604 (2d Cir.), cert. denied, 344 U.S. 838, 73 S. Ct. 20, 97 L.Ed 652 (1952). If it is "impossible to say that committing to the untramelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution," as the Supreme Court has recently held [*McGautha* v. *California,* 402 U.S. 183, 207 (1971)], the Due Process Clause is not violated by permitting a trial judge to exercise his discretion, albeit without specific standards to guide him, to provide hopefully

> rehabilitative medical treatment to felons he finds likely to benefit by this type of sentence and not to others. 445 F.2d at 960-61 (footnote omitted).

Nor does the claim that imposition of a reformatory sentence requires a separate determination raise a substantial constitutional question. While there is some authority to support this position,[11] we feel that the question is foreclosed by *McGautha* v. *California,* 402 U.S. 183 (1971), in which the Court held that a separate penalty hearing was not required to enable a jury to impose the death penalty. Although the case before us differs from *McGautha* in that the penalty is judge-imposed, we see no reason why this distinction alone should require a bifurcated procedure. On the contrary, since a New York judge before imposing a reformatory sentence on a misdemeanant has the benefit of a pre-sentence report[12] and any statements which the defendant and his attorney wish to make in his behalf,[13] a separate hearing on sentencing appears less necessary here than in *McGautha.*

II. *New York Correction Law Sections 803 and 804.*

We turn to the issue of whether the challenge to New York Correction Law Sections 803 and 804 raises a substantial constitutional question.[14] These provisions make persons sentenced to indeterminate and definite terms eligible for conditional release. By omitting reformatory sentences, they operate to deprive persons subject to such sentences of the benefit of good behavior allowances which are accorded other inmates.

Initially, we must decide whether a class action determination is proper. There is no doubt that it is. The class of persons adversely affected by this statute is larger than that discussed above since it would include reformatory sentenced felons as well as misdemeanants. The class is, therefore, clearly too numerous to permit joinder. The constitutionality of the statute is a question of law common

to all. Although all the named plaintiffs are misdemeanants, their claims are typical of the claims of all, including felons, and they will, as we have stated above, fairly and adequately represent the interests of the entire class. Moreover, the party opposing the class has acted on grounds applicable to all and declaratory or injunctive relief would be appropriate with respect to the class as a whole.

We turn to the merits of this count. Defendants' position is that the reformatory sentence and denial of good time are two sides of the same coin, the purpose of both being the creation of a flexible program designed to rehabilitate those who appear susceptible to treatment. Thus, the legislature has ordained a longer maximum term and made release before the end of the term conditioned on *successful* participation in rehabilitative programs (parole), rather than willingness to participate in them (good behavior allowance).

Without deciding, now, whether the legislative scheme rests on constitutionally acceptable premises, it is at least clear that, if in practice it confines youthful inmates longer than adults without actually offering them a program of rehabilitation, its operation would raise a serious constitutional question. In *Bolling* v. *Manson,* Civ. No. 14,932 (D. Conn., July 12, 1972) (three-judge court), the court held that depriving juveniles and women sentenced to indefinite terms of good time credit deprived them of equal protection because "[s]ince . . . the state has made no distinction in conditions of confinement based on the nature of an inmate's sentence, there is no basis in fact, much less a compelling state interest grounded in different treatment methods, behind the challenged discrepancy in good time." *Id.* at 4. *See aso Royster* v. *McGinnis,* 332 F. Supp. 973 (S.D.N.Y. 1971) (three-judge court), *prob. juris. noted,* 405 U.S. 986 (1972).

Appendix G.

Plaintiffs allege facts which appear identical to those underlying the decision in *Bolling;* this, alone, would normally entitle them to have their case heard directly by a three-judge court. However, given the interrelated nature of the two statutes under consideration and of the facts on which the constitutional challenge to each depends, we believe that, since a hearing is necessary as to the sentencing provisions, the better course would be to await the outcome of the hearing before convening a three-judge court as to either statute.

Accordingly, we reserve decision as to plaintiffs' motion to convene a three-judge court until after the evidentiary hearing discussed above. Decision on defendants' motion to dismiss the complaint must also await the outcome of the hearing. Plaintiffs' motion for a class action determination is granted. The class challenging Sections 75.00 and 75.10.1 of the Penal Law will consist of all misdemeanants serving reformatory sentences, while the class challenging Sections 803 and 804 of the Correction Law will include all reformatory sentenced inmates, felons and misdemeanants alike. Defendants' motion to quash plaintiffs' interrogatories and requests for admissions is denied; since we have held that this action is a class action attacking the statute as applied, it is clear that the interrogatories and requested admissions are relevant. Defendants are allowed ten days from service of the order denying this motion to serve answers to the interrogatories and requests for admissions.

Submit order.

Dated: New York, New York
October 25th, 1972.

.....
U.S.D.J.

Appendix G.

FOOTNOTES

[1] In addition to the convening of a three-judge court plaintiffs seek 1) a declaratory judgment that Sections 75.00 and 75.10.1 of the New York Penal Law and Sections 803-804 of the New York Correction Law are unconstitutional; 2) a preliminary injunction against the enforcement of these statutes; 3) permission to add six plaintiffs; 4) permission to proceed as a class action; 5) permission to proceed *in forma pauperis;* and 6) the appointment of Herman Schwartz, Edward I. Koren, Norman Rosenberg and Melvin Wulf as counsel to plaintiffs. Plaintiffs' motions to add six additional plaintiffs is granted. The motions to proceed *in forma pauperis* and for the appointment of counsel are granted as to Judy Spratling, Susan Pasnik, Daisy Johnson, Edna Griffin, Diane Piacentine and Linda Felong. The motions of Lois Sero, Vanessa Carney and Rita Varner are denied without prejudice for lack of adequate evidence of their indigency.

[2] Defendants also move to quash plaintiffs' interrogatories and requests for admissions.

[3] Lois Sero, Rita Varner, named plaintiffs, and Myletta Joyner, who is not a named plaintiff, moved to set aside their sentence raising the same issues that are presented for decision here. Their motions were denied in decisions by Judge Kasler of the City Court of Buffalo. *People of the State of New York* v. *Lois S. (Anonymous)*, Docket No. 1A-15863 (March 27, 1972); *People of the State of New York* v. *Myletta J. (Anonymous)*, Docket No. 1A-8864 (March 27, 1972); *People of the State of New York* v. *Rita Varner*, Docket No. 1A-9816 (November 10, 1971). Their applications for leave to appeal were denied by Judge Mattina of the Erie County Court as to Lois Sero and Myletta Joyner on April 12, 1972, and by Judge Colucci of the same court as to Rita Varner on February 24, 1972. Leave to appeal to the Court of Appeals was refused by Judge Jasen of that court on May 16, 1972, as to Sero and Joyner, and on April 20, 1972, as to Varner.

[4] *See, e.g., Caldwell* v. *United States*, 435 F.2d 1079 (10th Cir. 1970); *Abernathy* v. *United States*, 418 F.2d 288 (5th Cir. 1969); *United States* v. *Rehfield*, 416 F.2d 273 (9th Cir. 1969), *cert. denied*, 397 U.S. 996, *reh. denied*, 397 U.S. 1081 (1970); *United States* v. *Dancis*, 406 F.2d 729 (2d Cir.), *cert. denied*, 394 U.S. 1019 (1969); *Johnson* v. *United States*, 374 F.2d 966 (4th Cir. 1967); *Brisco* v. *United States*, 368 F.2d 214 (3d Cir. 1966); *Kolz* v. *United States*, 353 F.2d 312 (8th Cir. 1965); *Rogers* v. *United States*, 326 F.2d 56 (10th Cir. 1963); *Standley* v. *United States*, 318 F.2d 700 (9th Cir. 1963); *Tatum* v. *United States*, 310 F.2d

854 (D.C. Cir. 1962); *Carter* v. *United States*, 306 F.2d 283 (D.C. Cir. 1962); *Cunningham* v. *United States*, 256 F.2d 467 (5th Cir. 1958).

[5] In *Cunningham* v. *United States*, 256 F.2d 467, 473 (5th Cir. 1958), the court said:

> While appellant does not here invoke, as indeed he cannot, the equal protection clause of the Fourteenth Amendment, against the classification of which he complains, it has been definitely settled . . . that classifications of the general nature of that involved here are not invalid. . . . [W]hile arbitrary or unreasonable classifications may not be set up, there must be differences in character, condition or situation to justify the distinction; that the distinctions and differences in short must bear a due and proper relation to the classification; the equal protection of the laws is afforded if the law in question operates in the same general way on all who belong in the same class. For the same reasons it will not avail appellant under this record to claim under *Bolling* v. *Sharpe* . . . that the due process secured by the Fifth Amendment has been in any way denied him.

[6] Plaintiffs err in contending that discrimination between "young adults" and adults as to reformatory sentences and denial of good time can only be upheld if the state can put forward a compelling interest to justify it. The provisions before us do not involve invidious classifications, such as race or wealth; nor do they burden specifically protected areas of the Bill of Rights so as to invoke this higher standard. Unlike other rights, such as the right to vote (*Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966)), or the right to travel (*Shapiro* v. *Thompson*, 394 U.S. 618 (1969)), the right to liberty has not been treated as so fundamental as to require the application of the compelling interest test. In *Baxstrom* v. *Herald*, 383 U.S. 107 (1966), a case involving discrimination between convicts and non-convicts in commitment to a mental institution, the court by implication accepted the rational basis test and struck down the distinction only because there was "no conceivable basis" for applying it. *Id.* at 111. In *Johnson* v. *Louisiana*, 406 U.S. 356 (1972), the Court upheld a statute which permitted criminal convictions and hence deprivation of liberty based on less than unanimous verdicts, because "the Louisiana statutory scheme serves a rational purpose." *Id.* at 363. In *Royster* v. *McGinnis*, 332 F. Supp. 973 (S.D.N.Y. 1971) (three-judge court), *prob. juris. noted.* 405 U.S. 986 (1972), a case challenging deprivation of good time, the court said: "[T]he real question, and indeed the only question, before

the court is whether a rational basis exists for the distinction made . . . between jail and non-jail defendants in the awarding of good time credit." *Id.* at 977. The court was unanimous on this point. *Id.* at 981. Since the above cases involve deprivation of liberty and apply the rational basis test, we feel constrained to apply the same test here, notwithstanding *Bolling* v. *Manson*, Civ. No. 14,932 (D. Conn. July 12, 1972) (three-judge court), which held that where liberty is involved the state must show a compelling interest. *Id.* at 4. Accordingly, the statutory scheme must not be disturbed if the defendants can show a rational basis for the classification on which it relies.

[7] In the case of *In re Herrera*, 23 Cal. 2d 203, 143 P. 2d 345 (Sup. Ct. 1943), Justice Traynor analyzed the rationale behind special sentencing procedures for youthful offenders:

> Petitioners contend that an unreasonable classification results from the provision that any offender who is less than 23 years of age at the time he is apprehended may be committed to the [Youth Correction] Authority. There are convincing reasons, however, for such a classification. The great value in the treatment of youthful offenders lies in its timeliness in striking at the roots of recidivism. Reaching the offender during his formative years, it can be an impressive bulwark against the confirmed criminality that defies rehabilitation, for it is characteristic of youth to be responsive to good influence as it is susceptible to bad. 143 P.2d at 348.

[8] *See. e.g., United States* v. *Waters*, 437 F.2d 722, 724 (D.C. Cir. 1970); *Rogers* v. *United States*, 326 F.2d 56, 57 (10th Cir. 1963); *Carter* v. *United States*, 306 F.2d 283, 285 (D.C. Cir. 1962); *Cunningham* v. *United States*, 256 F.2d 467, 471-72 (5th Cir. 1958). See also *In Re Herrera*, 23 Cal. 2d 203, 143 P.2d 345 (Sup. Ct. 1943).

[9] Discussing a habeas corpus petition questioning the constitutionality of the statute's application in an individual case, the Appellate Division of the State of New York has said:

> The ability to benefit from, and the availability of, rehabilitation facilities and treatment form a rational basis for distinguishing between persons convicted of the same offense, so as to subject one to a potentially greater period of confinement. . . .
>
> • • • •
>
> However, it is precisely the rationale for finding no deprivation of equal protection to those given reformatory sentences that requires the granting of habeas corpus relief herein. Whereas the provision for reformatory sentences is

> constitutional, . . . the [statute] may not . . . operate to confine a reformatory term inmate for a period greater than the maximum to which a prison term inmate convicted of the same crime is subject, unless the basis for distinguishing between the two persons continues to exist.
>
> • • • • •
>
> The evidence here is that the relator is not receiving the benefits of rehabilitation facilities and his treatment is indistinguishable from those with prison terms. A holding that equal protection is not violated by such confinement beyond the maximum for a prison sentence for the same offense would be inherently inconsistent—the constitutionality of the relator's reformatory sentence is sustained, in theory, on the ground that rehabilitation is a rational basis for distinguishing between persons convicted of the same offense, while, in operation, . . . no rational basis for distinction now exists. *People ex rel. Meltsner* v. *Follette*, 32 App. Div. 2d 389, 390-91, 302 N.Y.S. 2d 624, 626-27 (2d Dept. 1969).

[10] Defendants' contention that an attack on a statute as applied must be determined by a single judge is without merit. The very cases which they cite establish the contrary proposition. *In Ex Parte Bransford*, 310 U.S. 354, 361 (1940), for example, the court stated:

> It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. (Footnotes omitted.)

Applying this standard, the Court of Appeals for this Circuit, has held:

> The distinction appears to be between acts the state statute permits (but does not necessarily require), and actions taken in reliance on, but in excess of, the State statute's authority. *Astro Cinema Corp., Inc.* v. *Mackell*, 422 F.2d 293, 297 (2d Cir. 1970).

Plaintiffs' claim falling in the former category, it is clear that a three-judge court would be required if plaintiffs demonstrate state-wide application.

[11] In the case of *In re Wilson*, 438 Pa. 425, 264 A.2d 614 (Sup. Ct. Pa. 1970), the Supreme Court of Pennsylvania held that a

juvenile can be sentenced to a longer commitment as a delinquent only if the juvenile has notice at the commencement of the proceedings against him of the fact that the state intends to seek to have him adjudicated a delinquent and on what facts it will base its request. Furthermore, the conclusion on which the ultimate finding of delinquency relies must be set forth in the record. 264 A.2d at 618. *See also Preliminary Report of the Governor's Special Committee on Criminal Offenders,* which persuasively advocates the necessity of a hearing:

> The authorized sanction for criminal conduct should be based upon the gravity of the conduct, and not upon the condition of the offender. Moreover, even if the reformatory term could be justified on the basis of the condition of the offender —as some sort of special exception in dealing with youngsters—the present statute does not even require proof of any condition. Under the present setup the misdemeanant between the ages of sixteen and twenty-one is not even entitled to the legal protection accorded juvenile delinquents and PINS; *i.e.*, a dispositional hearing in which the question of whether he requires "supervision, treatment, or confinement" can be litigated. The reason he is not accorded such protection is that the sentence is a criminal sanction, rather than a civil commitment. And, as such, it should be proportioned to the conduct.
>
> If we wish to have a reformatory sentence, based in part upon criminal conduct, and in part upon the theory that the State has the right to exercise special custody rights over youth who are in need of "education, moral guidance and vocational training," then any youth to be subjected to such special custody should, at least, have the same protection we accord others who are subjected to such special custody (*e.g.*, the juvenile delinquent, PINS, narcotic addict, mentally ill, etc.). He should have a hearing to determine whether he, in fact, needs supervision, treatment or confinement for a period beyond that which is justified by the gravity of his crime. *Id.* at 147.

[12] McKinney's Consolidated Laws of New York, Book 11-A, Criminal Procedure Law § 390.20(2)(b) (1971).

[13] McKinney's Consolidated Laws of New York, Book 11-A, Criminal Procedure Law §390.50 (1971).

[14] This challenge is properly brought pursuant to the Civil Rights Act, rather than the Habeas Corpus Act. Royster v. McGinnis, 332 F.Supp. 973, 976 (S.D.N.Y. 1971) (three-judge court), prob. juris. noted, 405 U.S. 986, 92 S.Ct. 1247, 31 L.Ed.2d 452 (1972).

APPENDIX H

Former Article 75.00 and 75.10 of the New York Penal Law.

PENAL LAW

§ 75.00 Reformatory sentence of imprisonment for young adults

1. Young adult. For sentencing purposes, a young adult is a person who is more than sixteen and less than twenty-one years old at the time the court imposes sentence upon him.

2. Reformatory sentence. When the court sentences a young adult for a crime, the court may, in lieu of any other sentence of imprisonment authorized by this title, impose a reformatory sentence of imprisonment. This shall be a sentence to imprisonment for a period of unspecified duration which shall commence and terminate as provided in section 75.10 and the court shall not fix the minimum or maximum length of the period.

3. Limitations. The court shall not impose a reformatory sentence in the following cases:

(a) Where the conviction is of a class A felony; or

(b) Where the court sentences the young adult for more than one crime and imposes a term of imprisonment for any one of the crimes; or

(c) Where the young adult is subject to any undischarged indeterminate sentence of imprisonment imposed at a previous time by a court of this state; or

(d) Where the conviction is of a crime that was committed by the young adult during incarceration in or after parole or release from an institution under the jurisdiction of the state department of correction.

L.1965, c. 1030, eff. Sept. 1, 1967.

Appendix H.

§ 75.10 Calcaulation of reformatory sentence

1. Commencement and termination. A reformatory period commences when the young adult is received in an institution under the jurisdiction of the state department of correction and terminates upon the first to occur of (a) discharge of the person by the state board of parole, or (b) service by the person of four years from the date the period commenced less any amount of time credited against the sentence pursuant to the provisions of subdivisions three, four and five of this section.

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.